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Current Topics.

WHAT IS A FINAL JUDGMENT.—Zeller *et al.* v. Switzer, was a case brought by error from the Supreme Court of Louisiana to the United States Supreme Court, October term, 1875. It was an action on a bond. The defendants answered, and at the same time filed a peremptory exception. The court below sustained the exception and gave judgment in favor of the defendants, without passing upon the defences set up in the answer. From this judgment an appeal was taken to the supreme court of the state, where a judgment was entered setting aside the judgment of the lower court and remanding the case for further proceedings. To reverse this judgment a writ of error was prosecuted. On a motion to dismiss the writ because the judgment was not final, the court by Chief Justice Waite said: "We think this motion must be granted. The judgment is one of reversal only, and the case is remanded to be proceeded with according to law. The supreme court has decided that the defence set forth in the peremptory exception was not good, and that is all that court has decided. The case was, therefore, sent back for trial upon the defences set up in the answer or any other that might be properly presented. If the decision below upon the exception had been correct, such a trial would have been unnecessary. The supreme court having decided that it was not correct, the inferior court must now proceed further. This brings the case within our ruling at the present term in *ex parte* French. The writ is dismissed."

THE NEW MINISTER TO ENGLAND.—Hon. Edwards Pierrepont, Attorney-general of the United States, has been nominated by the President and confirmed by the senate, as minister to the Court of St. James. His successor in the department of justice is Judge Taft of Ohio, the late secretary of war.

Judge Pierrepont was born on March 4th, 1817, in North Haven, Conn., and is consequently 59 years of age. He graduated from Yale College, studied law in the New Haven school, and commenced the practice of law at Columbus, Ohio. Five years later, in 1847, he removed to the east and resumed practice in New York city. He was elected a judge of the superior court, but resigned before the end of his term. Until 1869, Judge Pierrepont continued his law practice in that city, being engaged in several noteworthy cases, in which he became associated with some of the leading practitioners at the bar. In the Merchant, Gardner and Freeman will cases, the second of them being tried in 1864, he was engaged as counsel. In the Freeman case, James T. Brady and Wm. M. Evarts also took part; and at the time of the libel suit of Mr. Opdyke against Thurlow Weed he was engaged by the defendant with Wm. M. Evarts. Perhaps his most distinguished practice was in the trial of John H. Surratt in 1867 for complicity in the assassination of President Lincoln. Immediately after his inauguration, President Grant appointed him United States District Attorney for Southern New York, but he resigned the place fourteen months later, and became an active worker in the movement against the Tammany ring, which began in the fall of the succeeding year, being one of the "committee of seventy." In 1872 he was offered the Russian mission, but declined the honor. At the annual commmencement of Columbia College at Washington, in 1871, he received the degree of doctor of laws, which honors were again conferred upon him two years later by Yale College. In April, 1875, he was appointed attorney-general, and since his connection with that office has been before the country in a prominent way through the attitude of the government toward the disturbances in Mississippi last summer, and the prosecution of the St. Louis whiskey frauds.

FEES OF FEDERAL COURT CLERKS.—The sub-committee of the congressional committee on expenditures in the department of justice is in session in the city of New York. The object of the committee is to gather information for the purpose of drafting a new law for the better regulation of the department of justice. For this purpose the committee will examine the clerks in the United States courts in New York and Brooklyn, the district-attorney, United States marshal and other officials who are in a position to give information concerning the present law and its defects. This plan involves the overhauling of the books and papers of the various offices, and opens up the whole field of investigation.

The first witness called was George F. Betts, clerk of the United States District Court for the Southern District of New York, who was examined at length as to the manner in which the business of his office was conducted. He testified that he had held the office for twenty-one years; that in addition to his office of clerk he was a United States commissioner, examiner in chancery, and master in chancery. For his services he was intitled by law to a fee of 1 per cent. on all moneys received and paid by him, although he was required to pay all fees above $8,500 per annum into the treasury. Among other items in his bill for fees was one for 1 per cent. on the sum of $270,000 paid by Phelps, Dodge & Co. in settlement of their suit, which witness testified he was entitled to by law, although the money did not pass through his hands. Where settlements were made in pending suits he was in the habit of presenting his bills for fees, even if the money was not paid into his office. His fees for searches of records in his office amounted to $5,000 or $6,000 a year, which he considered as belonging to him personally, and made no return of to the treasury. In reply to questions, the witness said that he did not in all cases make these searches himself, but employed the clerks in his office to do it. Probably half of this work was done by clerks. In all, the witness thought the office netted him $12,000 to $15,000 per year. Mr. Betts explained the manner in which jurors were chosen in the United States courts. The names were selected from lists made up by himself and the clerks of the other courts from names usually taken from a city directory. There were six counties in the district, but jurors were selected from the city only.

Lincoln B. Benedict, clerk of the United States District Court, Brooklyn, testified as to the manner in which the work in his office was done. He was not in the habit of taking fees in cases where a settlement was made, and where moneys were not paid into his office. He charged a small fee for searches, but always turned over to the treasury any money received for such purpose.

Divorce in Florida.

We publish an opinion of the attorney-general of Florida, Hon. W. A. Cocke, on the jurisdiction of the circuit courts of that state to grant divorces. In his judgment, the constitution does not give them any such powers, as it simply says that the circuit courts shall have original jurisdiction in all cases in equity, and in law where the demand exceeds $100, and as a procedure for divorce is neither an "action at law,"

nor a "case in equity." The opinion of the attorney-general is as follows:

The history of this question, and the strict terminology of the constitution of 1868, prescribing the jurisdiction of the circuit courts of this state, will show conclusive reasons why no cases in which divorces have been granted by the circuit courts organized under the constitution of 1868 are legal. The first act on the subject was passed in 1835, and gave jurisdiction to the circuit courts of this state in all claims for divorce. The act of 1853 regulates the jurisdiction of the courts, as regards the time of residence in this state, of the applicant. It is important to observe, when the first law on the subject of divorces was passed, there existed in this state no constitutional provision in relation thereto. But the constitution of 1839 said: "Divorces from the bonds of matrimony shall not be allowed but by the judgment of a court, as shall be prescribed by law." Con. of 1839. This legalizes the act of 1835, and the act of 1853 was not repugnant to the constitution of 1839.

In 1870, the code practice, recognizing the validity of the acts passed under and previous to the constitution of 1839, prescribes the mode of giving notice. This was the only act passed since the adoption of the constitution of 1868, and the act of 1873, repealing the code, strikes this section in relation to divorces from the statute-book. There were territorial and state laws existing on the statute-books of this state, and they were, under the constitution of 1839, of full force and effect; but since the adoption of the constitution of 1868, no decree, in any matter of divorce in this state, is legal, and for this obvious reason: The constitution of 1868 prescribes the jurisdiction of the circuit courts. It says: "The circuit courts shall have original jurisdiction in all cases in equity," and it also prescribes the jurisdiction in cases at law. *Vide* Con. of 1869, Art. VI., section 8; amendment 1875, Art. IX., section 8.

Here is the defined jurisdiction of the circuit courts. Antecedent legislation, repugnant to this last constitutional clause, can not be recognized. In granting divorces under these laws, passed before the adoption of the present constitution, our courts have taken cognizance of cases over which they have no jurisdiction.

The present constitution, in defining the jurisdiction of the circuit courts, can not be presumed to embrace cases in divorce under the terms "all cases in equity." That they are cases in equity, no lawyer will contend. Are they cases in law, embraced in the constitution of 1868, or the amendments of 1875? Clearly not, for the section says, after the term "all cases in equity," "also in all cases at law in which the demand, or the value of the property involved, exceeds $100, and in all cases involving the legality of any tax assessment, toll, or municipal fine, and of the action of forcible entry and unlawful detainer, and of actions involving the titles or right of possession of real estate, and of all criminal cases, except such as may be cognizable by law by inferior courts." The next sentence is in relation to the appellate jurisdiction of the circuit court.

The next and last clause gives to the circuit court and judges the power to issue writs of mandamus, injunction, *quo warranto, certiorari, habeas corpus*, and all writs proper and necessary to the complete exercise of their jurisdiction. Here is the defined jurisdiction of the circuit courts to all cases in equity, and prescribing what cases are embraced in the term "all cases in law." The statutory cases coming within the jurisdiction of the courts, under an abrogated constitution, are not within the jurisdiction of the present circuit courts where these courts have no jurisdiction beyond the constitutional limitations, and such statutory cases being excluded by the said jurisdiction clause in the constitution.

It is evident that the term "all cases in equity" can not embrace cases of divorce. The history of this question shows that the jurisdiction in England was not in the courts of common law, nor in the chancery court, but in ecclesiastical courts and in Parliament. The ecclesiastical courts exercising jurisdiction in cases *a mensa et thoro*, and Parliament in cases *a vinculo*. In the United States the legislatures formerly granted divorces *a vinculo*. In more recent times the constitutions of the states have extended jurisdiction to the courts over cases of divorce *a mensa et thoro* and *a vinculo*. But where the jurisdiction of a court is confined to cases in equity, and the jurisdiction of all cases at law also defined by the constitution, it is impossible for a court with such restrictions to take cognizance of any statutory case clearly outside of constitutional limitations and restrictions."

It is not unlikely that the constitutions of some other states may, in regard to the jurisdiction of courts, be similar to that of Florida.

United States Supreme Court. Cases Dismissed for Want of Jurisdiction.

The following six cases were dismissed during the last term of this court, as not arising under, or involving a law of the United States. Brief opinions were delivered by the chief justice in each.

The first, Rockhold v. Rockhold, *et al.*, in error to the Supreme Court of Tennessee, was a suit brought against executors for an accounting. The answer of the defendants set up that they were forced by military power to receive a large sum from a debtor of the estate in confederate money, and pay it over to the receiver of the Confederate States. When this took place the country was under complete military rule, and they were compelled to obey the authorities. The Supreme Court of Tennessee decided that this showed a good ground of excuse. To reverse this decision this writ of error was brought. The learned chief justice in delivering judgment said: "We can not distinguish this case from Bethel v. Demaret, 10 Wall. 537; Delmas v. Ins. Co., 14 Wall. 666; and Tarver v. Keach, 15 Wall. 67. The state court has only decided that, upon principles of general law, a trustee can not be held responsible to his *cestui que trust* for the loss of a trust fund, if the loss has not been occasioned by his own *laches* or bad faith, and that the delivery of the trust fund in this case by the defendant into the hands of the confederate authorities, under an order which he dared not disobey, excused him from liability to the plaintiff. This is not a federal question, and the motion to dismiss the case for want of jurisdiction must be granted."

Warfield v. Chaffe, *et al.*, in error to the Supreme Court of Louisiana, was another case. It was an action on a promissory note, and also to enforce a vendor's privilege. Judgment was asked for the amount claimed to be due upon the note, and also for "fifteen dollars, costs of stamping." Attached to the petition was a copy of the note, bearing date May 3, 1867, below which was the following: "Original act duly stamped and cancelled by Collector of 3d District of Louisiana, this 3d day of September, 1872. F. A. Hall, D'y Recorder." The defendant, among other defences, insisted that there were not any revenue stamps on the note when it went into the hands of the plaintiffs, and that they had no authority to put stamps upon it. At the trial no question as to the stamping was presented or decided. Judgment was given for the plaintiffs and affirmed in the supreme court on appeal. In the opinion of the court the only reference to the question of stamps which appears, is as follows: "The objection that the note was not stamped, not having been made when it was received in evidence, can not now be considered."

In the petition presented to the chief justice of the supreme court of the state for the allowance of this writ, it is stated, for the first time in the case, that the defendant claimed the privilege, right and immunity of being relieved and exempted from all liability on the note or obligation sued on, under the laws of the United States, requiring such instruments to be stamped to give them validity at the time the instrument sued upon was executed, and the decision of the supreme court of the state denied the claim. A motion to the United States Supreme Court to dismiss the case for want of jurisdiction was granted. The record did not disclose any such claim. The petition for the allowance of the writ of error is no part of the record of the court below. This court acts only upon that record, and that does not show that any federal question was either presented by the pleadings or upon the trial in the district court, or decided by the supreme court.

The third case McManus, *et al.* v. O'Sullivan, *et al.*, in error to the Supreme Court of California, was as follows: Terence B. McManus, under whom the plaintiff claimed, entered into the possession of the premises in controversy in 1854, or thereabouts. He continued his possession until his death, in 1861, at or about which time the defendants entered and held adversely to his estate until the commencement of this action, in August, 1867. At the time McManus entered, and all the time he was in possession, the city of San Francisco was asserting title to the property, under a Mexican pueblo right, before the commissioners appointed under the act of Congress providing for the settlement of private-land claims in California, and before the courts upon appeal. A decree was rendered in favor of the city by the Circuit Court of the United States, May 18, 1865. From this decree an appeal was taken to this court, pending which an act was passed March 8, 1866, entitled "An act to quiet the title to certain lands within the corporate limits of the city of San Francisco." 14 Stat. 4. Two questions were presented to the state court for adjudication: 1. Does possession necessarily connect itself with the true title, in the absence of proof to the contrary? and, 2. Is possession within the meaning of the statute of limitation in California, adverse to one who claims title, if it is not also adverse to all the world?

On the motion to dismiss, Chief Justice Waite said: "If these questions were decided against the plaintiff, no federal question could be involved. The record, without the opinion of the court, shows that they were presented, and does not show that any federal question was decided. Under such circumstances it is proper, if it can be at any time, to look to the opinion of the court, which has been sent here with the record, to ascertain whether, in point of fact, the court necessarily passed by the intermediate questions, and actually did decide as to the effect of the pueblo right and the treaty, with the accompanying acts of Congress upon the title of the plaintiff. Looking to that, we find the court did decide that possession did not carry with it the presumption that the plaintiff did hold under the city title, and that if the possession of the defendants was adverse to the plaintiff, it was a bar to his right of action, even though it was not adverse to all the world. These are questions within the exclusive jurisdiction of the state courts, and not subject in any manner to our re-examination. Their decision against the plaintiff made it unnecessary to consider the proposed federal question. Thus it is seen that the federal question was, in fact, not decided, and that in the view the court below took of the case such a decision was not necessary. It is clear, therefore, that we have no jurisdiction of this case and that it must be dismissed."

In the fourth case, Romie v. Casanova, in error from the same court, the opinion of the supreme court was as follows:

No federal question is presented in this case. The action was brought to recover the possession of certain lands. Both parties claimed title from the city of San Jose, and the question to be determined was which of the two had actually obtained a grant of the particular premises in controversy. The title of the city was not drawn in question. It is said that depended upon the treaty of Gaudaloupe Hidalgo and the several acts of Congress to ascertain and settle private-land claims in California, but this does not appear in the record. Even if it did, the case would not be different, for both parties admit the title of the city, and their litigation extends only to the determination of the rights which they have severally acquired under it. The writ is dismissed."

The fifth, McStay v. Friedman, in error from the same court, was an action of ejectment brought by Friedman to recover the possession of a certain parcel of the Pueblo lands confirmed to the city of San Francisco by the act of Congress passed March 8, 1866. 14 Stat. 4. He did not attempt to connect himself with the city title, but relied entirely upon his alleged prior possession and that of his grantors.

The defendants, plaintiffs in error, set up in their answer as defences, 1. adverse possession, with specifications to bring themselves within the operation of the statute of limitations; and 2. the title of the city of San Francisco under the act of Congress, and an assignment of that title to themselves, pursuant to the provisions of an ordinance of the city and an act of the legislature of California.

At the trial, no question was raised as to the validity or operative effect of the act of Congress. The effort on the part of the plaintiffs in error seems to have been, 1. to establish their defence under the statute of limitations; and 2. to prove such possession as would, according to their claim, transfer the city title to them under the operation of the city ordinance and the act of the legislature. On motion to dismiss the writ for want of jurisdiction, the chief justice said: "No federal question was involved in the decision of the supreme court. The city title was not drawn in question. The real controversy was as to the transfer of that title to the plaintiffs in error, and this did not depend upon the 'Constitution or any treaty or statute of, or commission held, or authority exercised under the United States.' The case is, therefore, in all essential particulars, like that of Romie v. Casanova, decided at the present term, and must be dismissed."

The last case, Watts v. Territory of Washington, was from the supreme court of that territory. The court said: "This court can only review the final judgments of the Supreme Court of the Territory of Washington in criminal cases, when the constitution or a statute or treaty of the United States is brought in question. Rev. Stat. sec. 702. This is a criminal case, but the record does not present for our consideration any question of which we can take jurisdiction. It nowhere appears that the constitution or any statute or treaty of the United States is in any manner drawn in question. The writ is dismissed for want of jurisdiction."

Donation of Railway-Aid Bonds—Construction of State Statute and Constitution.

TOWN OF CONCORD v. PORTSMOUTH SAVINGS BANK.

Supreme Court of the United States, October Term, 1875.

A statute of Illinois passed in 1867, authorized certain incorporated towns to appropriate moneys to aid in the construction of a railroad, payable when its track should be built through the town, and provided a majority of the electors voting should favor the appropriation proposed; and the town, November 20, 1869, voted to make an appropriation, if the company would run its road through the town, and the company, June 20, 1870, gave notice of its acceptance, and the bonds were issued, October 9, 1871, reciting the title of the said statute, and stated that they were issued by virtue thereof; and the bonds were issued before the completion of the railroad through the town. *Held*, that the bonds were void, being issued in contravention of the constitution of July 2, 1870.

Argument 1. The bonds which the statute authorized to be issued were not a *subscription* but a *donation*. The constitution, in annulling the power of municipalities to make donations to railroad companies, withdrew the power given by the statute of 1867 to make the donation, before it was made.

Argument 2. There was no contract to be impaired. The company's acceptance was an undertaking to do nothing which it was not bound to do. The town's promise to give was supported by no consideration. The town had no authority to contract to give. No donation was authorized until the completion of the road through the town. The vote following the appropriation was not in itself a donation.

In error to the Circuit Court of the United States for the Northern District of Illinois.

Mr. Justice STRONG delivered the opinion of the court.

The bonds to which the coupons in suit were attached purport to have been made under legislative authority given to the town officers by the act of March 7, 1867. Their recitals make direct reference to that act by its title, which is set forth at length, with an averment that they were issued under and by virtue of it. The primary question, therefore, is whether that statute did in reality give to the supervisor and clerk of the town power to execute and deliver town bonds, on the 9th day of October, 1871, (when the bonds were in fact issued,) as an appropriation or donation to the railroad company. The first and second sections are the only ones to which reference need be made. By the first it was enacted that certain incorporated towns and cities, and towns acting under the township organization law, (among which it is conceded the town of Concord was one,) should be and were severally authorized to appropriate such sum of money as they might deem proper, to the Chicago, Danville and Vincennes Railroad Company, to aid in the construction of the road of said company; to be paid to the company as soon as the track of said road should have been located and constructed through said city, town, or township respectively. To this was attached the following proviso: "Provided, however, that the proposition to appropriate moneys to said company shall be first submitted to a vote of the legal voters of said respective townships, towns, or cities, at a regular annual or special meeting, by giving at least ten days, notice thereof; and a vote shall be taken thereon by ballot at the usual place of election, and if the majority of votes cast shall be in favor of the appropriation, then the same shall be made; otherwise not." The second section empowered and required the authorities of said municipalities to levy and collect a tax, and make such provisions as might be necessary for the prompt payment of the appropriation under the provisions of the law.

The authority given to the town of Concord by this statute was not to subscribe to the stock of the railroad company, but to make an appropriation or donation in aid of the construction of the road, and even that donation was not permitted to be made until after the completion of the location and construction of the road through the town. It has been strenuously insisted during the argument that the act conferred no power upon the town to make an appropriation or donation by the issuing of bonds or certificates of indebtedness. It is said other provision was made for the donation; provision by the levy and collection of a tax. We do not care, however, to discuss this matter, for in the view which we have of the case it is quite immaterial. A popular election having been held, and a majority of votes cast at the election having been in favor of the appropriation, it may be conceded that payment of the appropriation could lawfully have been made in town bonds, instead of money, if the donation itself was authorized. The real question is whether the authority to make the donation existed when it was made. The act of the legislature of 1867 may have been authority for a donation at any time prior to July 2, 1870, and no authority at all afterwards. And such we think it was. The popular vote in favor of an appropriation was on the 20th of November, 1869, but it was not itself an appropriation or donation, and the town was not authorized to make it until the railroad was located and constructed through the town. Before that time, and before any attempt at a donation or appropriation was made, the authority to make it was withdrawn. If no effect be attributed to the rescinding vote of June 30th, 1870, the new constitution of the state, which came into operation on the 2d of July, 1870, annulled, we think, the power of municipalities to make donations to railroad companies. It ordained that "no city, town, township, or other municipality shall ever become subscribers to the capital stock of any railroad or private corporation, or make donation to, or loan its credit in aid of, such corporation. Provided, however, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions, where the same have been authorized under existing laws, by a vote of the people of such municipalities prior to such adoption." This article, in our opinion, makes a clear distinction between subscriptions to the capital stock of a railroad company, or a private corporation, and donations or loans of credit to such corporations. The latter are prohibited under all circumstances. The former may still be made, if they have been authorized by a vote of the people prior to the adoption of the constitution A very able and ingenious argument has been submitted to us, aiming to show that in fact the article makes no such distinction, and that donations and subscriptions are put upon the same footing; but we cannot yield to it our assent. No matter what may have been the intention of the mover of the proviso, the intent of the framers of the article, and of the people adopting it, must be gathered from the article itself. There was reason for the distinction. For subscriptions to capital stock the municipality got something for which there was at least a possibility of return, more than was possible in the case of donation. In both cases public convenience may have been contemplated, but in the one more than that may have been contemplated and expected, and this may have been the prevailing motive for assent to a subscription. It cannot be doubted that a subscription would have been voted in many cases where a donation, or a loan of credit would not have been. If, then, the state constitution prohibited donations to railroad companies, made after its adoption, the act of the legislature of 1867 became ineffective after July 2, 1870. After that date the power no longer existed in the municipality. We do not say that the new constitution could annul or impair any contract that was made between the town and the railroad company, during the time in which the town had authority to make it. A constitution can no more impair the obligation of a contract than ordinary legislation can. But the record exhibits no contract made before July 2, 1870. The town voted on the 20th day of November, 1869, that it would make a donation, provided the company would run its railroad through the town. On the 20th of June, 1870, the company gave notice of its acceptance of the donation. But the town was not impowered to make the donation until the road was located and constructed through the town. It had no authority to make a contract to give. And the acceptance was an undertaking to do nothing which the company was not bound to do before the authority of the town to make a donation, or to engage to make a donation, came into existence. What is called the acceptance of the railroad company can not be construed as an engagement to locate and build the railroad through the town. It amounted to no more than saying, "If we build our road through your town, we will receive your gift." There was, therefore, no consideration for the town's promise to give, even if the popular vote can be considered a promise. There was no contract to be impaired. A contract should be clearly proved before it invokes the protection of the federal constitution. We conclude, then, that at the time the donation was made there was no authority in the municipality to make a donation to the railroad company, and consequently no authority to issue the bonds. It follows that the bonds and coupons are void.

The judgment is reversed, and the record is remitted for a new trial.

Priority of Vendor's Lien over Mechanic's Lien.

SEITZ *ET AL.* v. UNION PACIFIC R. R. CO.

Supreme Court of Kansas, March, 1876.

Hon. S. A. KINGMAN, Chief Justice.
" D. M. VALENTINE, } Judges.
" D. J. BREWER, }

1. Priority.—A vendor's lien has priority over a mechanic's lien.

2. Increased Value of Property.—Under the Mechanic's Lien Law of 1862 (Comp. Laws, 680, *et. seq.*) the lien of a mechanic for labor and materials operates upon the whole of the estate of the debtor in the premises, and is a paramount lien upon its surplus value, over and above what would have been the value of such estate, without such labor and materials.

3. Equitable Estate.—Where the party making improvements is only possessed of the equitable estate in lands subject to the lien, the lien attaches simply to such equitable estate, and does not affect the rights of the party holding the legal title.

C. A. Hiller, for plaintiffs; *J. P. Usher* and *C. E. Bretherton*, for defendants.

The opinion of the court was delivered by VALENTINE, J.

The facts of the case are substantially as follows: The Union Pacific Railroad Company, Eastern Division, owned three lots in the city of Salina. Mrs. M. A. Bickerdyke desired to build a hotel on them. The parties therefore agreed that Mrs. Bickerdyke should build and furnish the hotel, and the railway company should advance money by way of a loan to assist her in building and furnishing it, and that when she should build and furnish it and pay back to the railway company the amount of money advanced by the company to her, the company would then execute a deed conveying to her the full legal title to the property. Under this contract the railway company furnished to Mrs. Bickerdyke the sum of $7,512.85, and she built and furnished the hotel. But she has never yet refunded the sum of money advanced, or any part of it, and the company has never yet executed to her a deed for the property. The contract between the railway company and Mrs. Bickerdyke was originally entirely in parol. But subsequently, and on November 4th, 1867, Mrs. Bickerdyke gave to the railway company her two promissory notes for the money advanced, and also gave a mortgage on the hotel property and on the furniture to secure the payment of the notes. The original parol contract was not, however, in any other manner disturbed or altered by these transactions. While Mrs. Bickerdyke was building the hotel, she obtained labor and materials for it from the defendants below, plaintiffs in error. The defendants below afterwards duly filed statements for mechanics' liens on the property, under the provisions of the statutes of 1862. Comp. Laws 680, *et seq.* These claims of the defendants have never been paid or satisfied. The court below held that these claims were valid liens upon the property, but also held that they were subsequent to the lien of the plaintiff, the railway company.

When the contracts for furnishing the labor and materials were made is not shown; whether any of them were made before the railway company furnished the money is not shown. Therefore, in support of the decision of the court below, we should presume that the contracts for labor and materials were made after the money was furnished, although probably it would make no difference in the decision of this case whether they were made before or afterwards. Some of the defendants furnished labor and materials before the mortgage was executed, and some of them afterwards. The judgment of the court below was that the property should be sold, and that the claim of the railway company should be

first paid from the proceeds of the sale. Of this the defendants (plaintiffs in error) complain.

They claim that their claims should be first paid. We think, however, that the judgment of the court below was correct. We think that it is not only supported by reason and justice, but it comes fairly within the spirit of the mechanics' lien law itself. The defendants make their claim exclusively under section 17 of that law. Comp. Laws, 683. But section 17 must be read in connection with section 14, and, indeed, in connection with the whole of the law upon the subject of mechanics' liens. Then, taking the whole of the law together, it undoubtedly means that a mechanics' lien shall operate upon the whole of the estate which the person procuring the labor and materials may have in the property for which he procures them, whatever may be the character of that estate, but that such lien can not operate upon anything more than such estate, and that, as far as it does operate, it is the paramount lien upon the enhanced value given to such estate by the labor and materials. That is, it is the paramount lien upon the surplus value of the estate over and above what would have been the value of such estate without such labor and materials.

In the present case, Mrs. Bickerdyke had a contingent equitable estate in the property in question. The plaintiff had all the rest of the estate. Upon this contingent, equitable estate of Mrs. Bickerdyke the defendants' liens operated, and upon that they were the paramount lien to the extent above mentioned; but they operated upon nothing more. They could not operate upon anything more. They could not reach anything that Mrs. Bickerdyke did not have. They could not reach to plaintiff's legal estate. A lien upon an estate cannot be greater than the estate itself. A stream cannot rise higher than its fountain. And therefore we think that the mechanics' lien did not in any manner affect the legal estate of the plaintiff, or its rights thereunder. But the plaintiff, as well as the defendants, had liens upon Mrs. Bickerdyke's equitable estate. It had a vendors' lien (Stevens v. Chadwick, 10 Kans. 406) and a mortgage lien. But for the purposes of this case we shall consider that the defendants' liens were paramount to either of these liens of the plaintiff. Indeed, for the purposes of this case, we shall consider the mechanics' lien of defendants upon Mrs. Bickerdyke's equitable estate as paramount and stronger than any other liens could possibly be. But the plaintiff had more than the vendors' lien and mortgage lien upon Mrs. Bickerdyke's equitable estate. It also had a lien upon the legal estate, and held such legal estate in its own hands, as a security for its own claim. And these last mentioned rights of the plaintiffs are rights not derived from Mrs. Bickerdyke, or from the defendants, or from any common grantor, but they are rights originally held by the plaintiff, reserved to it by the transactions with Mrs. Bickerdyke, and with which it has never parted. And these rights are governed more by the law relating to vendor and vendee, than by any law relating to liens and incumbrances. Originally the plaintiff held the whole of the estate, both legal and equitable. It parted with the equitable estate upon certain conditions. But it reserved to itself the legal estate, with a lien upon it, to secure the payment of the debt of $7,512.85. Now, how can the plaintiff be divested of this legal estate, except by the payment of such debt—except by the fulfillment of the terms and conditions upon which it agreed to divest itself of its legal estate? To take the legal title to the property from the railway company without paying its debt, against the consent of the company, and for no crime or fault of the company, would look very much like confiscation. If the judgment of the court below had merely ordered Mrs. Bickerdyke's equitable estate to be sold to satisfy the defendants' claims, then, possibly, there would have been no necessity for making any provision for the payment of the plaintiff's claim. But the purchaser of the property, in such a case, would have stood precisely in the place of Mrs. Bickerdyke. He would have obtained precisely her equitable estate; nothing more, and nothing less. And before he could have obtained the legal estate, he would have had to fulfill all her obligations to the plaintiff. But the court below did not stop with ordering that the equitable estate of Mrs. Bickerdyke should be sold. The court ordered that the entire estate, legal as well as equitable, should be sold. And, therefore, as the sale would divest the plaintiff of its legal estate, the court had to provide by its judgment for paying the plaintiff's claim. We see no error in this. On the contrary, it was eminently just and legal. We suppose that no one will claim that the giving of the promissory note for the debt, and the giving of the mortgage upon Mrs. Bickerdyke's equitable estate and upon the furniture in the hotel to secure the payment of such notes, will in any manner change the plaintiff's rights with regard to the legal estate, when, at the same time, the legal estate was reserved as a further security for the payment of the debt.

The judgment of the court below will be affirmed.

Power to Appoint Receiver under Banking Act.

WRIGHT v. THE MERCHANTS' NATIONAL BANK.

United States Circuit Court, Western District of Tennessee.

Before Hon. H. B. BROWN, District Judge, for the Eastern District of Michigan.

The provisions of the general banking law for winding up national banks under the direction of the controller of the currency, are not exclusive, and were not intended to oust the courts of their power to appoint a receiver upon a judgment-creditor's bill.

Demurrer to judgment-creditor's bill.

The bill sets forth in substance that complainant had recently obtained judgment of ten thousand dollars against defendant in the state court; that she was unable to obtain payment of the same; that the bank had closed its doors, discontinued business, and was insolvent; and that in contemplation of such insolvency had conveyed and transferred all its assets to one creditor, namely, a correspondent bank in the city of New York, which was also a large stockholder in the defendant corporation; that this preferred creditor is appropriating all the assets to its own debt; that nothing will be left for the plaintiff, or can now be collected by legal process, and she therefore prayed for an injunction and receiver.

Demurrer was taken to the bill upon the sole ground that under the provisions of the national banking law a receiver could only be appointed by the controller of the currency.

Messrs. Welch, T. W. Brown and *W. Y. C. Humes*, for complainant; *Mr. Beard*, for the defendant.

BROWN, J.—The power and duty of a court of equity to appoint a receiver upon the application of a judgment-creditor, is too well established to admit of doubt. Edwards on Receivers, 396; Hadden v. Spader, 20 Johns. 554; Taylor v. Jones, 2 Atk. 600; Edgell v. Haywood, 3 Id. 352; Candler v. Pettit, 1 Paige, 158; Weed v. Pearce, 9 Cowen, 722; Lewis v. Zouch, 2 Sim. 388; Bloodgood v. Clark, 4 Paige, 574; Ogilvie v. Knox Insurance Co., 22 How. 380; Parkhurst v. Kinsman, 2 Blatch. 78. There is no allegation in the bill that execution has been issued and returned unsatisfied, but as no demurrer is interposed upon that ground, and as the point was not made upon the argument, I shall notice it no further.

Indeed, it was practically conceded that a case for a receiver was made out, unless the power of appointing receivers of national banks was exclusively vested in the controller of the currency. Title 62 of the Revised Statutes relating to the organization of banks, provides for the appointment of a receiver by the controller of the currency to wind up their affairs, only in the following cases: First, for not keeping good a surplus. Sec. 5151. Second, for not keeping stock at minimum. Sec. 5141. Third, for not keeping good its reserve. Sec. 5191. Fourth, for not selecting a place for the redemption of its notes. Sec. 5195. Fifth, for holding its own stock over six months. Sec. 5201. Sixth, for non-payment of its circulating notes. Sec. 5234. Seventh, for improperly certifying a check. Sec. 5208. Eighth, for failing to pay up capital stock, and to allow the same to become, and to remain, impaired by losses. Sec. 5205.

If a judgment-creditor may not invoke the aid of a court of equity he is powerless to enforce his claim, unless he can persuade the controller of currency to interfere in his behalf. Sec. 5242 provides that a "transfer of notes, bills of exchange, bonds or other evidences of debt owing to any national banking association, or of deposits to its credit, all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor, all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors, and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void." No method, however, is provided of winding up a bank guilty of any of the acts mentioned in this section, nor is the power given to the controller of currency apparently designed to reach these cases. It is at least doubtful whether he would have power, upon the application made by this bill to interfere and appoint a receiver. That the winding-up provisions of the act were not designed to be exclusive, it seems to me, is fairly to be inferred from section 5241, which provides, that "no association shall be subject to any visitorial powers other than such as are authorized by this title, *or are vested in the courts of justice.*" There is certainly an implication here that the courts *may* exercise a visitorial power, and as this power is usually if not always exerted through the agency of a receiver, I should regard the language of this section as justifying the appointment of one.

But even if the power had been given to the controller of the currency to appoint a receiver in cases like the present, in the absence of restrictive language, it is at least doubtful whether it should be regarded as forestalling the jurisdiction of the courts.

The general rule with regard to the election of remedies is stated in Sedgwick on Statutory Law, pages 93–401. "Where a right originally exists at common law, and a statute is passed giving a new remedy without any negative, express or implied, upon the old common law, the party has his election either to sue at common law or to proceed upon the statute; the statutory remedy is merely cumulative." A clause in a railroad act authorizing the directors to exact a forfeiture of the stock and previous payments, as a penalty for non-payment of installments, does not, before forfeiture has been declared, impair the remedy of the directors to enforce payment by action at common law. Northern Railroad Co. v. Miller, 10 Barb. 260.

These principles have been applied to the winding-up act of English corporations, and have uniformly been held as not exclusive of the ordinary remedies provided by law. Lindlay on Partnership, 861.

In Jones v. Charlemont, 16 Sim. 271, a bill was filed for the purpose of winding up the affairs of a railway company. The defendant demurred upon the ground that plaintiffs might have obtained their object under the special act of 9 and 10 Vic., to facilitate the dissolution of railway companies, and that that act had ousted the court of its jurisdiction in cases clearly within its operation. The vice-chancellor, however, declined to hear counsel for the complainant, and overruled the demurrer.

The same question again came before the court in the case of Clemments v. Bowers, 17 Sim. 167, which was a bill by a shareholder in a company, on behalf of himself and others, praying an account of receipts and payments of defendants on behalf of the company. Defendants were members of a finance committee who were alleged to have exclusive control over the money affairs of the corporation. They demurred on the ground that the legislature having provided a method of winding up and dealing with the affairs of a railway company, the court ought to refuse to a party the right of coming to have the accounts taken. The court observes: "To oust the jurisdiction of a court of chancery in such a case, the legislature should have so declared. It is plain where a court of equity has jurisdiction in such a case, an act of giving further relief does not by that oust the title of the court of equity, without express terms being used to put an end to the jurisdiction which is inherent in the court." Similar views were expressed by the court of chancery in 1853, in the case of Tripp v. The Chard Railway Co., 21 Eng. Law and Eq. 53, which was an application by a mortgagee for the appointment of a receiver. A provision in the act that any mortgagee whose interest was in arrear for 21 days might have a receiver appointed. upon application to two justices, was held to oust the jurisdiction of the court to appoint a receiver with the usual powers. Counsel for defendant cited to the court upon the argument the case of Smith v. Manufacturers' Bank, 9 B. R. 122, in which Judge Blodgett, of the Northern District of Illinois, held that the bankrupt act was not intended to apply to national banks, and that the provision made by Congress for their winding up, when insolvent, was exclusive. Although the two cases are not exactly analogous, the reasoning of the court in that case undoubtedly applies to the one at bar.. Having intimated an opinion upon the argument before this case was cited, that the winding-up provisions were not exclusive, I felt bound on hearing the case, in deference to the views of the learned judge, to withhold my decision until I had made a more careful examination of the law. From correspondence with him I am informed that he has modified, to some extent, the views expressed in that opinion, and that in the subsequent case of James Irons v. The Manufacturers' National Bank, not reported, he appointed a receiver of the same bank upon the application of a judgment-creditor. He there observes: "It would seem that the controller only has the right to appoint a receiver upon the existence of the facts which clothe him with that power, and that he rightfully declines to act in this case. I can see nothing in the law itself, nor in the decisions of the courts upon the law, so far as they have gone, to exclude the idea that a corporation created as this is, under an act of Congress for certain specified purposes, does not come within the general provision of the law regulating the remedies of creditors the same as any other corporation, except where there are specific provisions to the contrary."

It is not intended in this case to decide whether the court would be authorized to appoint a receiver upon the happening of the contingencies authorizing such appointment by the controller of the currency. I am clearly of the opinion, however, that when the act does not provide for the introduction of the controller, a judgment-creditor is entitled to the aid of a court of equity. I see nothing in the case of Gibson v. Kennedy, 8 Wall. 498, which conflicts with these views. Nothing was decided in that case, except that it is for the controler to determine when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether a whole or part, and if a part, how much shall be collected. It is true there are certain *dicta* in the opinion which, literally construed, would indicate that creditors must, in all cases, seek their remedy through the controller in the mode prescribed by statute, but I am satisfied the court did not intend that language to be of universal application, and that it should be limited to the facts of the case before it.

Nor is there any force in the objection that a receiver appointed by this court would be powerless to obtain possession of the surplus of bonds on deposit in Washington, for the redemption of its circulating notes. I can not assume that the controller of the currency would refuse to comply with the order of a court having jurisdiction of the case.

On the whole, I am of the opinion that in the absence of action on the part of the controller of the currency, this court has the power to appoint a receiver upon the application of a judgment-creditor, subject, possibly, to his being superseded by the action of the controller. The demurrer must be overruled.

Bank Checks—Rights and Duties of Holders and Drawers—Presentment by Mail.

FARWELL *ET AL.* v. CURTIS.

United States Circuit Court, Western District of Wisconsin.

Before Hon. J. C. HOPKINS, District Judge.

1. Case in Judgment.—On 5th April, defendant gave plaintiff a check on the bank of New Lisbon, in payment of certain goods. Plaintiff who resided in Chicago sent the check by mail to said bank, to be paid and returned to them. It reached the bank on the 7th, and the amount was immediately charged against defendant, who had funds to cover it, and a draft on the Union National Bank at Chicago was sent to plaintiffs. The draft was received by plaintiffs on the 9th, and on the 10th presented to the Chicago bank, who refused payment. The bank at New Lisbon had meanwhile stopped payment, though on the 7th it had the money to pay the check. *Held*, that the plaintiffs had been guilty of negligence and could not recover.

2. Duty of Holder of Check.—The holder of a check can not extend the time for which the drawer would be liable.

3. Presentment by Mail.—It seems that where the holder sends a check by mail to the drawee, if the money does not return by return mail, notice of dishonor should be given.

Tenneys, Flower & Abercrombie, for plaintiff; *Vilas & Bryant*, for defendant.

HOPKINS, J.—This action was brought to recover the price of certain goods sold by plaintiff to the defendant in April, 1875. The defence is payment. The issue has been tried by the court. The real point of the defence is, whether a check given by defendant on the 5th of April, 1875, for $800, was and is to be held as a payment. The parties have stipulated the facts to be: that on the 5th day of April, 1875, the defendant, a resident of New Lisbon, in this state, purchased goods of plaintiffs in Chicago, their place of business, to the amount of eight hundred dollars and over, and on that day gave his check to the plaintiff for the sum of $800 upon the bank of New Lisbon, a banking house doing business in that place, to apply as *payment* towards the goods so purchased by him to that amount; that the plaintiffs, on the same day, sent the check per mail to the bank, the drawees, with instruction to collect and return; that there is a daily mail between Chicago and New Lisbon; that the check was received at the Bank of New Lisbon on the morning of the 7th of April, and was paid out of defendant's funds on deposit in the bank, there being sufficient for that purpose, and charged to his account; that the bank, on the 7th of April, sent to the plaintiffs, through the mail, a draft for the amount of the check on the Union National Bank, Chicago, which was received by them on the morning of the 9th, which they on that day deposited in the Bank of Montreal, of Chicago, for collection, and which was, on the 10th of April, presented to the Union National Bank for payment, and not paid, and was returned on the same day to the plaintiffs, who, on the same day, wrote the New Lisbon Bank that the check would go to protest, if not paid on Monday, and to defendant that it was not paid, and asking him "to poke up the bank on the matter." It not being paid, it was on Monday, the 12th, protested, of which defendant was notified per mail.

It is further stipulated that the Bank of New Lisbon could have paid said check *in money* up to the 10th day of April; but that on the close of the day's business on that day it stopped payment, having up to that time paid all checks presented for payment; that the bank had not the funds in the Union National Bank to meet the draft when they drew it, nor authority to draw it without funds.

These are the material facts established by the evidence, and the question is whether the plaintiffs were guilty of such negligence in presenting the check and demanding payment as to discharge the drawer.

The practice of sending checks by mail to the drawee, I think is not usual, and has received much judicial consideration, and not any direct sanction, that I can find. In Morse on Banking, page 334, he says it is a good presentment, and cites for his authority Bailey v. Bordenham, 10 *Law Times*, N. S. 422. I have examined that case, and it gives some countenance to his assertion, but I think the point is not absolutely decided.

In these days when such facilities are furnished by express companies for presentation at distant places, there is no reason for adopting a less direct or effective mode to accomplish the object. In this case there is a daily mail, by railroad, between Chicago and New Lisbon, and a daily express, also, with route agents and local agents, which furnished ample opportunities for presentation at the bank counters as early as the morning of the 7th of April, and probably on the morning of the 6th, if it had been sent by the first opportunity. But if sent by the last train on the 6th, it would have reached New Lisbon on the morning of the 7th, and could have been collected and returned so as to have reached the plaintiff by the morning of the 8th of April. To send by mail to the drawees, with instructions to collect and return, under such circumstances, is hardly equivalent to a demand at the counter for payment. The bank could not have paid the currency if it had it; there was no one to pay it to. The admission is that the bank was paying and had the money to pay up to and including the 10th, so that if the money had been asked on the 7th it would have been paid. Now, as the plaintiff adopted another course than the one which the exercise of ordinary care and diligence would have dictated, and loss has resulted by reason of it, they should stand it. But it may not be necessary to settle this point, as Morse, who says a presentation by mail is good, as well as the case cited by him to support the assertion, says that when the holder sends by mail to the drawee directly, if the *money* does not come back by the *return* mail, notice of dishonor should be given. Adopting that rule would not relieve these plaintiffs, for they did not comply with it; the money did not come back by the next mail, nor was the check protested as it required. But instead of the money on the 9th, four days after the receipt of the check a draft came back on the Union Bank, but that was not presented until the 10th for payment, and was not protested until the 12th, so that conceding that the presentation by mail was sufficient, the plaintiff was guilty of *laches* in not presenting the draft before the 10th. The delay in protesting it until the 12th is inexcusable according to any rule of diligence that I know of, so that assuming that Mr. Morse states a safe and satisfactory rule, it does not exonerate these plaintiffs from *laches*. But I think if the time is extended beyond what it would have been if sent by the usual and ordinary modes, that is, by express, or to some party to present, and beyond the period established by law as reasonable for presentation, and a loss happens by reason of the failure of the drawee, the payee of the check is alone chargeable with it.

For instance, in this case, it is admitted that the bank had the money

to pay the check up to and including the 10th, so that if payment had been demanded in the usual way, it would have been paid, and if the parties chose to make the drawee their agent, and the drawee, as their agent, sent a worthless draft, instead of the money which he would have paid to any party presenting the check at the counter and charge the check to the drawer, the same as if paid in money, so that he had no right to enforce his claim or power to protect himself. After that act, the payee should incur the loss, instead of the drawer, that ensued by the subsequent failure. The charge to defendant's account was made on the 7th of April, in the morning, and the check marked paid, and what was done after that time was done by the bank at plaintiff's request, and as *their* agent, and whether in good or bad faith on the part of the banker, the drawer is not to blame or chargeable therewith, or for any loss resulting therefrom.

The common or commercial law has fixed certain times within which checks must be presented to the drawees for payment, and when it appears that the bank was paying during that time, and the drawee's account was good for the same, and the refusal or failure to obtain payment after was by reason of the failure of the bank occurring subsequent thereto, the loss has to be borne by the payee or holder of the check. That rule is, in cases where the parties all reside in the same place, that it must be presented for payment before the close of business on the day following its date or delivery to the payee; and in cases where it is drawn upon a bank at another place, it must be sent, at the farthest, by the last mail on the next day after it is received, and be presented by the party receiving it on the day following the reception by him. 20 Wend. Smith v. James, 192; Story on Promissory Notes, 493.

If not thus regularly demanded, and the bank or bankers should fail, after those times, the loss will be the loss of the holder, who is considered as having made the check his own by his *laches*. If the check is presented and not paid, notice of dishonor must be given the drawer, in order to charge him. Now in this case it is plain that the plaintiffs did not observe these rules. They sent the check in time, and if the presentation by letter was a good demand, it was presented on the 7th in the morning; then it should have been paid on the 7th, and if not, the drawer should have been notified of its non-payment. But instead of being paid in money, it was paid by draft on Chicago, and it is claimed that the plaintiffs had time to present that, to see whether it would be paid, and that if not paid, they could then protest the check. This is not the law. The holder of a check can not in that way extend the time for which the drawer would be liable. The drawer had a right to have his check paid on the day presented, and it was the duty of the holder to see to it that it was so paid, or if not, protested, and if the holder accepted the check or draft of the bank in payment in lieu of money, he must present and collect it the same day, or else he is chargeable with *laches*. He can not, as in this case, keep it for *three* days, and then go back upon the drawer of the check if it is not paid, as by so doing he would extend the drawer's liability for two days beyond the time fixed by the law. Alexander v. Bruchfield, 7 Man. & G. 1061.

This point is directly decided in Smith v. Miller, 43 N. Y. 171. In that case the check of the drawee was taken and presented at the bank on the following day—but before its presentation the drawers of the check had failed. The party accepting the check in payment thereupon protested the draft which they received in payment of, and brought suit to recover the amount of the draft, claiming that as the check was presented on the next day after its date, it was duly presented, and if not paid, the draft for which it was given was not paid.

On the contrary, it was claimed that as the drawers of the check were paying all of the day on which it was given, and that if it had been presented on that day, it would have been paid, and that as it was taken in lieu of the money, it should have been presented on that day; that the party could not have the whole of the next day to present a check taken under such circumstances, which was sustained by the court.

"It was the duty of the plaintiffs to present the check at the bank, at least during the day on which they received it, and obtain either the money or a certificate, or cause the same to be protested for non-payment, and not having done so, they were chargeable with negligence and the consequent loss."

Here, even giving the plaintiffs the benefit of the time allowed when sent by mail, as in other cases, and they are guilty of negligence; they received the bankers' check on the 9th, but delayed presenting it for payment to the Union National Bank until the 10th. Certainly such negligence can not be tolerated in treating with paper that they had taken in lieu of money, without the consent or knowledge of defendant. The plaintiffs can not hold the defendant liable on his check. During the time they were thus experimenting with the check they received from the bankers, in payment of his check that, to them, was good.

The banker may have, and probably did, practise a fraud upon the plaintiffs when they sent this draft on the Union Bank. But the defendant is not chargeable with that. He can say to the plaintiffs, if you had sent the check to a party here to present in the usual way, it would have been paid, and I have a right to require you to pursue the ordinary course in such case, and if you depart therefrom, and are defrauded by your agent, which in this case was the banker, it is your loss, and you alone are liable, as you brought it unnecessarily upon yourself.

Under the evidence, defendant must therefore have judgment.

—THE bill introduced into the English House of Commons to render counsel liable for professional negligence, has been defeated by a vote of 237 to 130. The division list shows that but for the votes of 150 members of the bar, who have seats in the house, the majority would have been the other way.

Railway Negligence—Fires.

GRAND TRUNK RAILWAY CO. v. RICHARDSON *ET AL.*

Supreme Court of the United States, October Term, 1875.

1. License to Strangers to erect Buildings.—Although a railway company is not at liberty to alienate any part of its roadway so as to interfere with the full exercise of its franchise, it may yet allow the erection of buildings for its convenience, even though they be for the convenience of others.

2. Evidence—Usage.—Evidence to show that it is not the practice of other companies to employ watchmen at a similar point, is not admissible to repel negligence.

3. ——. Previous Negligence.—Evidence that locomotives of the defendant, previous to the fire, while passing the plaintiff's property, had scattered fire, *held* admissible, as tending to prove a probability that some locomotive caused the fire, and also a negligent habit of the agents of the company, although it may not have been proved that the one that caused the fire was among the number.

4. Rebutting Evidence—Discretion of Court.—Whether evidence admitted on behalf of the plaintiff after the close of the defendant's case is strictly rebutting, is a matter that rests in the judgment of the court below, and is not reviewable.

5. Property of Trespasser.—The railway company is liable for the property of a trespasser destroyed by its negligence.

6. Construction of Statute.—A statue of Vermont enacted that when any injury was done to a building or other property by fire from the locomotive of any railway, it should be liable for such injury, and that the company should have an insurable interest in such property along its route. *Held*, that this embraces property both within and without the lines of the roadway.

In error to the Circuit Court of the United States for the District of Vermont.

Mr. Justice STRONG delivered the opinion of the court.

The plaintiffs below were permitted to adduce evidence that those of the injured buildings which were within the lines of the roadway had been erected within those lines by the license of the company, for the convenience of delivering and receiving freight. The admission of this evidence is the subject of the first assignment of error, and in its support it has been argued that it was the duty of the railroad company to preserve its entire roadway for the use for which it was incorporated; that it had no authority to grant licenses to others to use any part thereof for the erection of buildings, and, therefore, that the license to the plaintiffs, if any was made, was void. Thus the basis of the objection to the evidence appears to be that it was immaterial. We are, however, of opinion it was properly admitted. If the buildings of the plaintiffs were rightfully where they were, if there was no trespass upon the roadway of the company, it was clearly a pertinent fact to be shown. And while it must be admitted that a railroad company has the exclusive control of all the lands within the lines of its roadway, and is not at liberty to alienate any part of it so as to interfere with the full exercise of the franchises granted, we are not prepared to assert that it may not license the erection of buildings for its convenience, even though they may be also for the convenience of others. It is not doubted the defendants might have erected similar structures on the ground on which the plaintiffs' buildings were placed, if in their judgment the structures were convenient for the receipt and delivery of freight on their road. Such erections would not have been inconsistent with the purposes for which their charter was granted. And if they might have put up the buildings, why might they not license others to do the same thing, for the same object, namely, the increase of their facilities for the receipt and delivery of freight? The public is not injured, and it has no right to complain so long as a free and safe passage is left for the carriage of freight and passengers. There is then no well founded objection to the admission of evidence of a license, or evidence that the plaintiffs' buildings were partly within the line of the roadway by the consent of the defendants. And the objection to the mode of proof is equally unsustainable. There was quite enough without the receipt of October 27, 1870, to justify a finding by the jury that the plaintiffs were not trespassers. But the receipt itself was competent evidence. It is true it was given after the occurrence of the fire, but it was a mutual recognition by the company and by one of the plaintiffs that the occupation of the roadway by the buildings had been, and that it was at the time of the fire, permissive, and not adverse. Taking the receipt, as the bill of exception shows, was the act of the defendants done by their agent, the engineer who had charge of the roadbed? It was, therefore, an admission by them that there had been consent to the occupation.

The second assignment of error is that the court excluded testimony offered by the defendants to show it was not the usual practice of railroad companies in that section of the country to employ a watchman for bridges like the one destroyed. It is impossible for us to see any reason why such evidence should have been admitted. The issue to be determined, was whether the defendants had been guilty of negligence, that is, whether they had failed to exercise that caution and diligence which the circumstances demanded, and which prudent men ordinarily exercise. Hence the standard by which their conduct was to be measured was not the conduct of other railroad companies in the vicinity—certainly not their usual conduct. Besides, the degree of care which the law requires in order to guard against injury to others, varies greatly according to the circumstances of the case. When the fire occurred which caused the destruction of the plaintiffs' buildings, it was a very dry time, and there was a high wind. At such a time greater vigilance was demanded than might ordinarily have been required. The usual

practice of other companies in that section of the country, shed no light upon the duty of the defendants when running locomotives over long wooden bridges, in near proximity to frame buildings, when danger was more than commonly imminent.

The third assignment of error is that the plaintiffs were allowed to prove, notwithstanding objection by the defendants, that at various times during the same summer before the fire occurred, some of the defendants' locomotives scattered fire when going past the mill and bridge, without showing that either of those, which the plaintiffs claimed communicated the fire, were among the number, and without showing that the locomotives were similar in their make, their state of repair, or management to those claimed to have caused the fire complained of. The evidence was admitted after the defendants' case had closed. But whether it was strictly rebutting or not, if it tended to prove the plaintiffs' case, its admission as rebutting was within the discretion of the court below and not reviewable here. The question, therefore, is whether it tended in any degree to show that the burning of the bridge and the consequent destruction of the plaintiffs' property was caused by any of the defendants' locomotives. The question has often been considered by the courts in this country and in England, and such evidence has, we think, been generally held admissible as tending to prove the possibility, and a consequent probability that some locomotive caused the fire, and as tending to show a negligent habit of the officers and agents of the railroad company. Pigott v. R. R. Co., 3 Manning, Granger & Scott, 229; Sheldon v. R. R. Co., 14 N. Y. 218; Field v. R. R. Co., 32 N. Y. 339; Webb v. R. R. Co., 49 N. Y. 420; Cleaveland v. R. R. Co., 42 Vermont, 499; R. R. Co. v. Williams, 42 Ill. 358; Smith v. R. R. Co., 10 R. G. 22; Longabaugh v. R. R. Co., 4 Nev. 811. There are, it is true, some cases that seem to assert the opposite rule. It is of course indirect evidence, if it be evidence at all. In this case it was proved that engines run by these defendants had crossed the bridge not long before it took fire. The particular engines were not identified, but their crossing raised at least some probability, in the absence of proof of any other known cause, that they caused the fire. And it seems to us that, under the circumstances, this probability was strengthened by the fact that some engines of the same defendants, at other times during the same season, had scattered fire during their passage. We can not, therefore, sustain this assignment.

It is contended further on behalf of the defendants, that there was error in the court's refusal to direct a verdict in their favor, because a large part of the property destroyed was wrongfully on their railway, and not within the purview of the statute of Vermont, on which the plaintiffs relied. If, however, we are correct in what we have heretofore said, it was not for the court to assume that any part of the property was on the roadway wrongfully, and to instruct the jury on that assumption. And even if it had been wrongfully there, the fact would not justify its destruction by any wilful or negligent conduct of the defendants. In Bains v. R. R. Co., 42 Vermont, 380, it was said that a railroad company in the discharge of its duties, and in the exercise of its right to protect its property from injury to which it is exposed by the unlawful act or neglect of another, is bound to exercise ordinary care to avoid injury even to a trespasser. If this be the correct rule, and it can not be doubted, how could the circuit court have charged as a conclusion of law, that the plaintiffs could not recover because their property was wrongfully within the lines of the defendants' roadway?

Again the court was asked to direct a verdict for the defendants, for the alleged reason that the damages were too remote. The bill of exceptions shows that the fire originated in the bridge of the defendants and spread thence to the mill and other property of the plaintiffs, and we are referred to the rulings in Ryan v. The New York Central R. W. Co., 35 N. Y. 210, and Penna. R. R. Co. v. Kerr, 62 Penna. St. 353, as showing that in such a case, negligently setting the bridge on fire is to be considered the proximate cause. We do not, however, deem it necessary to enquire whether the doctrine asserted in those cases is correct. It is in conflict with that laid down in many other decisions; indeed, we think, in conflict with the large majority of decisions made by the American courts upon similar cases. But we think the statute of Vermont has a direct bearing upon the defendants' liability. That statute, chapter 28 of the general statutes, secs. 78 and 79, is as follows:

Sec. 78. "When any injury is done to a building or other property by fires communicated by a locomotive-engine of any railroad corporation, the said corporation shall be responsible in damages for such injury, unless they shall show that they have used all due caution and diligence, and employed suitable expedients to prevent such injury."

Sec. 79. "Any railroad corporation shall have an insurable interest in such property as is mentioned in the preceding section, along its route, and may procure insurance thereon in its own name and behalf."

That the statute contemplates such buildings and property as was destroyed in this instance, we cannot doubt. The buildings were along the route of the railroad, though some of them were in whole or in part within the lines of the roadway. It is obvious to us that the phrase "along the route" means in proximity to the rails upon which the locomotive-engines run. That the 79th section gave an insurable interest in the property, for the destruction of which the corporation was made liable, does not necessarily show that the only property intended was such as was outside the lines of the roadway. That, indeed, was comprehended, but property lawfully within the lines, which the company did not own, equally needed protection. The statute was designed to be a remedial one, and it is to be liberally construed. In Massachusetts, there is a statute almost identical with that of Vermont, and under it the supreme judicial court of the state held, in Ingersoll v. The Stockbridge & Pittsfield Railroad Co., and Quigley v. Same, 8 Allen, 438, that the company was liable to both the plaintiffs, though the fire communicated directly from the locomotive to Ingersoll's barn and spread through an intervening shed, which stood partly upon the railroad location, to the barn of Quigley. "There is nothing in the statement to show that any fault of the plaintiff contributed to the loss, if the buildings were lawfully placed where they stood. The fact that a building stands near a railroad, or wholly or partly on it, if placed there with the consent of the company, does not diminish their responsibility in case it is injured by fire communicated by their locomotives. The legislature have chosen to make it a condition of the right to run carriages impelled by the agency of fire, that the corporation employing them shall be responsible for all injuries which the fire may cause." These cases are directly in point as to the reach of the statute. They show that it embraces buildings on the line of the roadway, and buildings injured by fire spreading from other buildings to which fire was first communicated from a locomotive. To the same effect is Hart v. The Western R. R. Co. 13 Metcalf, 99. And if it be conceded that the statute is applicable only to injuries of buildings and other property which the railroad company may insure, it is not perceived why they may not obtain insurance of buildings and property on their location with their consent. But if the statute is applicable to the case, it is plain that the circuit court could not direct a verdict for the defendants for the reason that the damages were too remote.

Exception was taken at the trial to the refusal of the court to affirm the defendants' points, the first of which was that "if the jury should find that the erection of the plaintiffs' buildings, or the storing of their lumber so near the defendants' railroad track, as the evidence showed, was an imprudent or careless act, and that such a location in any degree contributed to the loss which ensued, then the plaintiffs could not recover, even though the fire was communicated by the defendants' locomotive." We think the court correctly refused to affirm this proposition. The fact that the destroyed property was located near the line of the railroad did not deprive the owners of the protection of the statute, certainly if it was placed where it was under a license from the defendants. Such a location, if there was a license, was a lawful use of their property by the plaintiffs, and they did not lose their right to compensation for its loss, occasioned by the negligence of the defendants. Cook v. Champlain Transp. Co., 1 Denio, 91; Ferc. v. Railroad Co., 22 N. Y. 215. Besides, it was not for the court to affirm that even an imprudent location of the plaintiffs' buildings and property was a proximate cause of the loss.

The second request for instruction was "that, at all events, under the circumstances disclosed in the case, it was incumbent upon the plaintiffs to use due caution and diligence, and to employ suitable expedients to prevent the communication of fire." The request was broad, but the court gave the instruction asked, adding only that there was no evidence in the case to which it had any application, and we have been unable to find any in the record. A question is not to be submitted to a jury without evidence.

The third prayer for instruction was based on the assertion that "the statute upon which the action was predicated does not apply to property located within the limits of the railroad, nor to personal property temporarily on hand." This view of the statute, as we have already remarked, is not, in our judgment, correct as a general proposition, and certainly not in its application to a case where property is placed within the lines of a railway, by the consent of a railway company, for the convenience in part of its traffic.

It remains only to add that we see no just ground of complaint of the affirmative instruction given to the jury. It was in accordance with the rule prescribed by the statute, and there seems to have been no controversy in the circuit court respecting the question whether, if the fire was communicated to the bridge by a locomotive, it caused the injury to the plaintiffs. The judgment is, therefore, affirmed.

Life Insurance—Forfeiture of Policy through Non-payment of Interest on Premium Note.

ANDERSON *ET AL.* v. ST. LOUIS MUTUAL LIFE INSURANCE CO.

United States Circuit Court, Western District of Tennessee.

Before Hon. H. B. Brown, District Judge.

1. Forfeiture—Interest on Note.—Where a policy of life insurance provides that if the insured shall fail to pay annually in advance the interest on any unpaid notes or loans owing to the company on account of premiums, the company shall not be liable for the payment of any part of the sum insured, and the policy shall cease and determine, a performance of this obligation on the part of the assured is a condition precedent, without which there can be no recovery.

2. Course of Business.—Where the course of business between the parties had been for the assured to pay this interest in cash and for dividends earned to be credited upon the principal of outstanding notes, *Held*, that this course of business controlled the general principle of law requiring payments upon notes to be credited first upon the interest and then upon the principal, and that the policy would be forfeited although the dividends earned might exceed in amount the interest due upon the outstanding notes.

3. Rule in Equity.—Equity will not relieve against a forfeiture of a life insurance policy incurred by non-payment of premiums upon the day stipulated.

On demurrer to bill in equity.

The bill after stating the title of complainants as the representatives of William C. Anderson, deceased, sets forth:

First. That on the 15th of October, 1867, the defendant issued to William C. Anderson a policy of insurance upon his life, in the sum of ten thousand dollars, premiums of four hundred and ninety dollars to be paid annually during his life. The policy, which is made an exhibit to the bill, provides that if the two first annual premiums shall be paid and default shall be made in the payment of any premiums thereafter to become due, such default shall not work a forfeiture, but the amount insured shall be commuted or reduced to the sum of the annual premiums paid. It further provides that if the insured shall fail to pay the two first annual premiums, or shall fail to pay annually in advance the interest on any unpaid notes or loans which may be owing by the insured to the company on account of any of the annual premiums, the company shall not be liable for the payment of the sum insured, or any part thereof, and the policy shall cease and determine.

Second. By certificate attached to the instrument, it appeared the policy was continued in force until the 15th of October, 1869, the premiums having been paid. Another like certificate extended the renewel until October 15th, 1870.

Third. To the bill was also attached a note of the intestate dated October 15th, 1868, payable twelve months after date for $245, with the recital that "the policy and all payments or profits which may become due thereon, are hereby pledged and hypothecated to said compamy for the payment of this note." The bill further sets forth that the defendant may have other like notes for loans to the company on account of annual premiums, with similar recitals, and calls upon defendant to exhibit the same.

Fourth. That complainants are informed that defendant claims that the assured failed to pay the premiums falling due subsequent to October 15th, 1870, and state that the assured died in 1872; that proofs of death were served on the company, and that time for payment has elapsed.

Fifth. That the defendant being a mutual company, the assured became a member by virtue of his policy, and interested in its earnings, was so treated by defendant. Dividends were declared in his favor and credited on his annual premiums, with consent of the assured. That the first certificate shows a dividend of $87.45 thus credited, but they have no means of knowing how many more dividends were declared, and as it could only be ascertained by an investigation of the books of the company, which they pray may be had.

Sixth. That complainants are informed there are some notes of the assured in defendant's hands * * * unpaid, which were given for premium loans; that is, the company under the policy providing for cash payments, but contemplating the right of defendant to loan part of the cash premiums to the assured and take his note therefor, * * * had thus loaned such amounts as the notes call for, or it was treated as a loan and notes taken similar to the one attached to the policy. The bill calls upon defendant to state how many of these notes they have.

Seventh. They admit that some interest on the unpaid note or notes was not paid annually in advance by the assured; that such failure, however, was not previous to October 15th, 1870, but whether he failed to pay the interest on more than one note, they are ignorant.

Eighth. They charge that whatever default was made in this respect, the amount of the same was very small, not more than from fifty to one hundred dollars, and they are advised that the stipulation providing for payment of interest in advance is but a penalty, and that the court will relieve against it.

The bill prays for a statement of the notes in defendant's possession, or for copies; also for an account of the dividends Anderson was entitled to subsequent to January 1st, 1869; and that the court relieve against the forfeiture of the policy, and decree the complainants the amount that may be justly due them. The only grounds of demurrer relied on are, that bill admitting the non-payment of certain interest in advance, and * * * the policy providing in such case for a forfeiture, and that all previous payments made thereon, and all dividend credit accruing thereon, shall likewise be forfeited, there is no ground for relief in equity.

Mr. W. M. Smith, for the complainant; *Mr. Charles Kortrecht*, for the defendant.

BROWN, J.—There are three questions in this case which though not raised separately upon the face of the demurrer, are necessary to be determined in order that it may be properly disposed of.

1. Under the policy in question, does the failure to pay the interest in advance upon the premium notes, debar the plaintiff of a recovery and work a forfeiture of the premiums already paid?

2. Was the defendant bound to apply the dividends due the assured upon the interest upon the premium notes, instead of applying them upon the principal and thus save the policy from lapsing?

3. Will a court of equity relieve against the forfeiture of a policy of insurance incurred by reason of the non-payment of premiums?

The first question must be answered in the affirmative. The second proviso of the policy is unequivocal that "if the assured fail to pay annually in advance the interest on any unpaid notes or loans which may be owing by the insured to the company on account of annual premiums, the company shall not be liable for the payment of the sum assured or any part thereof, and this policy shall cease and determine." The fifth clause also provides that "in every case where this policy shall cease or become null and void, all previous payments made thereon, and all dividend credits accruing therefrom, shall be forfeited to the said company." Nothing could be plainer than this language. The prompt payment of preminms is the very essence of the contract of life insurance. The company has a right to insist upon the performance of this covenant, upon the day named, as a condition precedent to the continued existence of the policy. So far at least, the law is well settled. Bliss on Life Insurance, 253 to 274; May on Insurance, 406; Robert v. The New England Life Insurance Co., 1 Disney, 355; Same Case, 2 Disney, 105; Want v. Blunt, 12 East, 133; Beadle v. Chenango Insurance Co., 3 Hill, 161; Pitt v. Berkshire Life Insurance Co., 100 Mass. 500; Baker v. Union Mutual Life Ins. Co., 43 N. Y. 283; Sheridan v. Phœnix Life Ins. Co., 8 House of Lords, 745; Catoir v. The American Life Ins. Co., 4 Vroom, 487. If it were otherwise, as it is optional with the assured to drop his policy at any time, the company could never know whether he intended to keep it alive or not. Sheridan v. Phœnix Ins. Co., 8 House of Lords, 745; Simpson v. The Accidental Death Ins. Co., 2 C. B. N. S. 257.

If the company elects to accept a note, and insists upon its prompt payment or upon payment of interest in advance, it is a proviso for the benefit of the assured, and the company has the same right to insis upon punctual payment. Patch v. Phœnix Ins. Co., 3 Bigelow, 780; Wall v. Home Ins. Co., 36 N. Y. 157; Williams v. The Republic Ins. Co., 19 Mich. 469; Pitt v. The Berkshire Life Ins. Co., 100 Mass. 500; Robert v. N. E. Mut. Life Ins. Co., 1 Disney, 355.

Nor is there anything harsh or oppressive in this requirement. The contract of insurance is one in which great risks are assumed by one party, and there is no injustice in requiring a punctilious observance of its obligations on the part of the other. The company says in substance to the assured "Pay me $490 to-day, and if you die to-morrow, or at any time during the year, I will pay your representatives $10,000; pay me the same sum annually, and this arrangement shall be continued during your life, with the assurance that your representatives will receive the $10,000 upon your death, whenever it may happen. But if, on the other hand, you fail to make your annual payments, your heirs shall not only not receive the $10,000, but you shall forfeit the amount already paid." I see nothing unfair or inequitable in this bargain, nor any reason why the company should not insist upon an exact performance by the assured. The hardship, if any there is, is quite as likely to fall upon the one party as the other, with this difference, however, that the contingency of loss by death is one the company can not possibly provide against, while the payment of premiums is always within the power of the assured, and nothing but his own negligence will cause a lapse of his policy. The fact that, in this case, the annual interest to be paid was very small, works no change in the principle. Indeed, it renders performance of his covenant on the part of the assured so much the easier.

I fail to see why courts should apply to policies of insurance rules of construction different from those applicable to ordinary instruments. If there is anything unjust in the proviso for the forfeiture, it is one which the legislature and not the courts are called upon to remedy. Something may be gained to justice by bending the law to the exigencies of an individual case; but more is lost by the bad precedent to the certainty of the law as a science.

While a company which desires to increase its patronage and stand well in public estimation would not, as a matter of policy, habitually take advantage of accidental slips or omissions of its policy-holders, the law can not distinguish between these cases and those where the assured elects deliberately to abandon his contract. In this case, however, there is nothing tending to show any desire on the part of the assured to keep his policy alive after October 15th, 1870.

As observed by the Court of Appeals of St. Louis, in the case of Russum v. The St. Louis Life Insurance Co., the clause in the policy providing for commutation on failure to pay the annual premiums, and for a forfeiture on a failure to pay the interest, are not inconsistent. "They can both stand together, and we may give full effect to both. All that is needed for this is for the insured to bring himself within the terms of both. The first is intended to save the forfeiture which generally would be incurred by the failure to pay the annual premium; to this extent it is a privilege or advantage to the assured. The second proviso insists upon vigorous conditions in respect to what? Only of so much of any unpaid premium as the assured, instead of paying in cash, takes the indulgence of only paying interest on at six per cent. If he does not wish to incur the hazard of a forfeiture on account of this part of the premium, his remedy is easy. He can presently pay his note for the premium, and without more, he has a paid-up non-forfeitable policy for a fixed portion of the sum contemplated by the instrument when originally issued. If he wished, instead of this, to take the chances of gain, he must at the same time incur the hazard of loss; and can not complain if he be held to the terms of the contract he has deliberately made."

I am unable to concur in the opinion of the Court of Appeals of Kentucky in the case of the St. Louis Mutual Insurance Co. v. Grigsby, 2 CENT. LAW J. 123, that by commutation this became "a paid-up policy, except that the company had the right, should its affairs render it necessary and proper, to demand the payment in whole or in part, of the note executed for the unpaid portion of the three annual premiums." The court in this case treats the unpaid notes as loans to the assured, and the "interest on these loans in no sense an annual premium due from the assured to the insurer." The effect of the ruling is that the company has no remedy to enforce payment of notes, except to bring an ordinary action at law, to trust to dividends earned in a successful business to meet them, or to wait until the death of the assured and deduct them from the amount of his policy. If this be the law, then the assured, under every policy issued by the company, after the payment of the two first annual premiums, may give no further attention to it, and the company be left to carry on its business, pay its expenses, its losses, its dividends and other outlays simply from the interest of the cash moiety of the first two annual premiums. The opinion throws no light upon the probable amount of dividends which a company, conducted under these principles, might be expected to pay.

2. Was the company bound to apply the dividends due the assured

upon the interest instead of the principal of the premium notes, and thus save the policy from lapsing?

The policy throws no light upon this point. It contains no agreement for the payment of dividends. The charter of the company is not before the court, and we can look only to the allegations of the bill to answer the question. The bill avers that the defendant, being a mutual company, the assured, by virtue of his policy, became a member and interested in its earnings and profits—was so considered and treated by defendant, and dividends were declared in his favor, and instead of being paid over to him in cash were credited on his annual premiums, as complainant supposes, and has no doubt, with the consent of the assured. From the bill and the exhibits the transaction appears to have been as follows: On the 15th of October, 1867, the policy was issued upon a payment of $245 in cash and a note for $245, upon which interest was paid in advance. On October 15th, 1868, the assured made another cash payment of $245, gave another note for the like amount, and paid in cash $20.40 interest on the two notes for one year. No dividend was credited to him at that time. On October 15th, 1869, a statement was made as follows;

Notes outstanding	$490.00
Less dividend declared Jan. 1st, 1869	87.45
Balance of outstanding note	402.55
Note portion of premium—due above date	245.00
Total new note	$647.55
Interest due in cash on note	$ 38.85
Cash part of premium due above date	245.00
Total cash required	$283.85

To this the receipt was appended.

While the general rule is admitted without hesitation, that where money is paid upon a note the law will apply it first upon the interest and then upon the principal, still, where the contract makes a different provision, or the course of business between the parties has established a different usage, I think the general rule must bend to this special agreement or custom. The policy makes no special provision for dividend credits, and its second proviso requires payment annually in advance of interest upon unpaid notes. The course of business between the parties as evidenced by the exhibits, shows that the annual dividend which was credited to the assured, was deducted from his notes outstanding October 15th, 1869, and not from the interest upon the new note, which was given at that date. This interest was paid in cash. This was done with the assent of the assured who appears to have given a new note for $647.55. All that the company could be required to do in crediting subsequent dividends was to apply them as had been done before, upon the principal of the outstanding notes, and as the assured had paid his interest in cash, I think he must be held as assenting to this arrangement. A similar rule or custom was recognized as binding upon both parties in the case of Ohde v. The N. W. Mut. Ins. Co., 4 Ins. L. Jour. 702. If there is anything in the regulations or prospectus of the company negativing the course of business evidenced by these exhibits, it should be set forth, and I think the bill demurrable upon that ground.

3. Has a court of equity power to relieve against the forfeiture of a policy.

In Story's Equity Jurisprudence, sec. 1314, it is said: "Whenever a penalty is inserted merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument, and the penalty is deemed only as accessory, and therefore as intended only to secure the due performance thereof, or the damage really incurred by the non-performance. In every such case the true test by which to ascertain whether relief can or can not be had in equity is, to consider whether compensation can be made or not." But in sec. 1323, it is said: "The doctrine seems not to be asserted in England that in all cases of forfeiture for the breach of any covenant other than a covenant to pay rent, no relief ought to be granted, in equity, unless upon the ground of accident, mistake, fraud, or surprise, although the breach is capable of just compensation." Sec. 1325: "It is upon grounds somewhat similar, aided also by considerations of public policy and the necessity of a prompt performance in order to accomplish public or corporate objects, that courts of equity, in cases of the non-compliance of the stock-holders with the terms of payment of their instalments of stock at the times prescribed, by which a forfeiture of their shares is incurred under the by-laws of the institution, have refused to interfere by granting relief against such forfeiture." In the Grigsby case already cited the Court of Appeals of Kentucky seemed to hold that equity would relieve against a forfeiture incurred by the non-payment of premiums, but I think this is opposed by a great weight of authority, including that of the learned circuit judge of this circuit, in the case of Tait v. The New York Life Insurance Company, 4 Big. 479, where the doctrine is fully discussed, and the conclusion reached, that equity has no power to afford relief. See, also, Robert v. New England Mutual Benefit Life Ins. Co., 1 Disney, 355; Mutual Benefit Life Ins. Co. v. French, 2 Cinn. Superior Court, 321.

As a further discussion of this point would be a mere reiteration of the opinion of the learned judge in the case above cited, nothing more will be added, except to say that this opinion is considered as an adjudication binding upon this court.

The demurrer to the bill is therefore sustained.

NOTE.—In the recent case of Frazer v. the St. Louis Mutual Life Ins. Co., United States Circuit Court, at Nashville, Tenn., Judge Emmons presiding, on a demurrer to a bill in equity where, as in the present case, the insured had failed to pay annually, in advance, the interest on the premium note, the point argued before the court was as to the forfeiture of the policy for non-payment of such interest. Stress was laid by defendant's counsel upon the circumstance that the policy was a commuted, paid-up one, except that a small amount of interest was stipulated to be paid every year; and it was urged that this was a condition subsequent, the non-performance of which could not forfeit the policy. That were the payment of interest neglected, this could not possibly prejudice the company, as the amount could be ascertained with perfect accuracy, and deducted from the amount of the policy, upon the occurrence of the death. That the interest must be regarded as secured by the hypothecation of the policy. That the case was emphatically one where equity would intervene to prevent a forfeiture. That cases where there had never been a forfeiture for non-payment of interest had been cases at law, etc. But the court held that the lapse of the policy for failure to perform the condition of its substance, could not, in any just sense, be termed a *forfeiture;* that it was a case where time was of the essence of the contract; and that, were such defaults excused in all similar instances, the financial consequence could not but be to disarrange the scheme of the company, looked at as a whole. That, therefore, by the failure to pay the annual interest on the note, as required, the policy had lapsed. The question of application of dividends, where the course of business between the company and the insured had been to apply such dividends to reduction of principal of the note, and not to the reduction or extinguishment of the interest, was not raised or decided. The decision was similar to that of Supreme Court of Vermont in Patch v. The Phœnix Mutual Life Ins. Co., 44 Vt., 481; Yerger v. The St. Louis Mutual Life Ins. Co., United States Circuit Court at Memphis, at a recent term, Judge Brown presiding; and to that of the St. Louis Court of Appeals, in February, 1876, in Russom v. The St. Louis Mutual Life Ins Co., *ante* page 276. It will be noted that the foregoing was not a case at law, but in equity.

M. G. S.

Conflict of Jurisdiction—Federal and State Process—Constitutional Law—Taxation—Judicial Comity.

BROOKS *ET AL.* v. CITY OF MEMPHIS *ET AL.**

United States Circuit Court, Western District of Tennessee.

Before Hon. H. H. Emmons, Circuit Judge.

1. Process, what is, and how Controlled.—Where there is an unsatisfied judgment in a Circuit Court of the United States against a municipal corporation, and the court upon a proper proceeding has by peremptory *mandamus* specifically directed the levy and collection of a tax for the payment of the judgment, the decision of all the questions that arise in the course of the levy and collection of the tax belongs to the Circuit Court of the United States. Thus, whether the writ of *mandamus* was properly awarded, whether the property from which it is sought to collect the tax is liable to taxation, whether the mode of arriving at the value of the property taxed is a lawful mode, are all questions for the Circuit Court of the United States. And that court having the jurisdiction, will, in some mode, control the operation of its process, so as to prevent injustice or wrong to any one affected by it. But a state court is powerless to interfere with the action of the corporation or its officers in the levy or collection of the tax under the *mandamus*.

2. Mode of Obtaining Relief from Improper Use of Process.—Where it is sought to control the execution of process, a summary application by motion, instead of plenary proceedings by bill, should be insisted on, save in those instances where a review by an appellate court is desired.

3. Constitutional Law—When remedy a part of the Contract.—A contract with a municipal corporation was made and the work performed, in reliance upon a mode of taxation, enabling the corporation to perform its part, which afterwards was declared to be unconstitutional by the supreme court of the state. The legislature afterwards supplied the place of the invalid law by another, which gave the power to levy a tax to pay the debt. Judgment having been obtained and a *mandamus* applied for to enforce its collection, the latter law was repealed. The repeal was disregarded, and the same rule applied as though the latter law had existed at the date of the contract.

4. Retrospective Legislation, as Affecting Remedies—When Void.—A state constitution provided that no "*retrospective law*, or law impairing the obligation of contracts should be passed." Under this clause the legislature has no right to repeal the only adequate existing remedy to enforce an existing judgment, without providing some other reasonable mode of enforcement in its place.

5. Power of Taxation by a Municipal Corporation, when implied.—From an express grant of power to a municipal corporation, to create a debt for a specified purpose, a power of taxation for its payment, will, in the absence of some other adequate means of payment, be implied, although at the date of such grant there is a statutory limitation upon the corporation's general power of taxation.

6. State Constitution—Effect of Practical Construction in the Federal Courts.—The greatest respect will be paid to the practical construction, given by the legislative and executive departments to constitutional provisions in respect to taxation, and their construction will be implicitly followed by the federal courts, unless most manifestly erroneous.

7. Judicial Comity—When Federal Courts will not delay Judgment to await decision of State Tribunals.—Although in some instances the federal courts will delay judgment, to await decisions in state tribunals, and follow such decisions when made, such course was deemed highly impolitic, and was not adopted, where by *mandamus* to pay a final judgment, a tax had been directed in conformity with the common usages of the state, and the objections urged against the lawfulness of the tax had not been raised in other cases, or as to taxes levied for other purposes.

Humes & Poston, Wright & Folkes, and *Clapp & Meux,* for plaintiffs; *Wm. M. Randolph,* for defendants.

*Reported for this journal by W. M. Randolph, Esq., of the Memphis Bar.

This was an application to Hon. H. H. Emmons, judge of the Sixth Circuit, to prevent the collection of a tax upon the capital of the plaintiffs, who are merchants in Memphis, levied under a *mandamus* from the Circuit Court of the United States, for the District of West Tennessee, to pay a judgment in favor of Talmadge E. Brown as surviving partner of T. E. Brown & Co., against the city of Memphis. The facts necessary to be understood are:

In the years 1867 and 1868, the city of Memphis entered into contracts for paving different streets of the city, some with Nicolson pavement, and some with stone, and undertook to charge the cost of the work on the owners of the lots abutting the pavement laid down, in proportion to the frontage of their respective lots on the streets or alleys paved. The authority to make the contracts was contained in an act of the legislature passed in November, 1866. Many of the owners of the property assessed paid their proportions of the cost of the pavement, whilst others refused to pay, and a litigation to enforce payment by those refusing was the result. This litigation was determined by the Supreme Court of Tennessee in the year 1872, by a decision that the act of the legislature of November, 1866, was unconstitutional, and that the contracts for the paving, so far as they attempted to charge the cost on the owners of the abutting lots, were void. T. E Brown & Co., who had become the assignees of the contracts for the laying of the Nicolson pavement, had a large balance due them for paving done, and J. & M. Loudon, the contractors for the stone paving, had likewise due them a considerable balance. The city, by the original contracts, had guaranteed the payment by the property owners of their respective assessments according to the terms of the contracts, which were half cash on the completion of the work, and the balance, in equal instalments, in thirty, sixty and ninety days. T. E. Brown & Co. brought an action against the city for the balance due them, and after a litigation, which was finally disposed of by the Supreme Court of the United States, they recovered in the Circuit Court of the United States at Memphis, on the 16th March, 1875, a decree for about $292,000.00, which was the amount then due them after allowing all payments. After the Supreme Court of Tennessee had decided that the act of November, 1866, which provided for charging the cost of paving on the abutting property was unconstitutional, the legislature in March, 1873, passed an act providing that the city should have power to levy a tax, in addition to all other taxes allowed by law to be levied, sufficient in amount to pay the entire cost of the paving laid down under the contracts which undertook to charge the cost on the abutting property, and which had been held void. On the 22d day of March, 1875, T. E. Brown & Co. filed their petition in the Circuit Court of the United States at Memphis, asking the allowance of an alternative writ of *mandamus* to be directed to the city, requiring it to levy a tax for the payment of their judgment. The alternative writ of *mandamus* was awarded and issued the same day. It was subsequently answered by the city, and on a demurrer to the answer, the alternative writ was made peremptory on the 30th March, 1875, and a judgment pronounced that the city proceed each year, for the years 1875 and 1876, respectively, to levy and collect, at the same time and in the same manner that it collected other taxes, a tax on all its taxable property, sufficient in amount to pay $125,000.00 each year, of the judgment in favor of T. E. Brown & Co., and to levy and collect in the same manner so much of the $125,000.00 for the year 1877 as might be required to satisfy the balance due on the judgment. The division of the amount to be paid was by agreement between Mr. Brown and Mayor Loague, in order to favor the tax payers and to avoid oppressing them. The judgment has never been appealed from. The city in pursuance of the *mandamus* in December, 1875, levied a tax on all taxable property of 54 cents on the hundred dollars in value, to be applied on the judgment.

It was discovered that the city tax collector, while collecting the tax so levied on the other taxable property, was omitting to collect it on the taxable capital of merchants. Mr. Brown made an affidavit of the fact, and while Judge Brown was presiding in the Circuit Court of the United States at Memphis, in March last, he ordered the city to include the taxable capital of merchants amongst the property taxed for the payment of the judgment of T. E. Brown & Co., and to collect the same tax therefrom that he collected from other taxable property, and to pay the same over to Mr. Brown, as commanded by the original writ of *mandamus*. In pursuance of this order the city tax collector is proceeding by distress, where necessary, to collect the taxes due by merchants for the purpose of paying the amount commanded to be levied and paid. To prevent the collection, many of the merchants combined and employed counsel, who gave opinions that they could successfully resist the tax. On Monday, 24th April, the matter was presented at Chambers at Nashville, to Judge Emmons, of the United States Circuit Court, who, after hearing counsel on both sides for parts of three days, decided that the tax must be paid. The points made by the counsel for the merchants were:

First. That the Circuit Court of the United States had no jurisdiction to determine the lawfulness of the tax, and that it should stay the collection until there could be a proceeding in the state court to test its legality.

Second. That the city had not at the time the contracts with T. E. Brown & Co. were made, and had not now, any general power to levy a tax for the payment of the judgment; and that the act of 1873 was not in force when the contracts were entered into; and being repealed by the act passed on the 20th day of March, 1875, and approved by the governor on the 23d day of the same month, it could not authorize the tax; and hence, that there was no power in the city to levy the tax for the payment of the judgment, as the court had commanded it to do.

And third, that as the law of the state of 1873, instead of providing for the ascertainment of the actual amount of capital that a merchant had invested in his business, did provide that the largest amount of goods that he had on hand at any one time during the year should be taken as his capital, it violated the constitution of the state in respect to equality and uniformity of taxation, and was void. And while it was admitted that the city ordinance was more favorable to the merchant than the state law, in that it levied no privilege tax, and took as his capital not the largest amount of goods he has on hand during the year, but the value of his stock on the 1st July, when his stock is least, yet, as a matter of fact, as the counsel contended, the city was levying and collecting taxes not under its own ordinance, but under the state law.

Judge Emmons delivered an oral opinion, substantially as follows:

That this case came before him as upon a bill in equity filed by tax payers of the city of Memphis, to restrain the execution of a *mandamus* issued by this court, commanding the municipal officers to levy a specific tax upon specific property.

The main facts in its support are contained in a petition addressed to the court, praying a writ of *certiorari* and *supersedeas* to these same municipal officers. This petition has been read as an affidavit in support of the application for an injunction. The court has already decided it had no jurisdiction directly by *certiorari*, to bring these proceedings before it for review. It thought the proper remedy was by bill in equity or, more appropriately, by petition, setting forth the facts, to stay the proceedings under the order for *mandamus*. There is a denial that in this instance the complaining tax payers have in fact been assessed under the state law of 1873, upon the largest amount of goods in possession during any day within the year. It is averred on the contrary by the city, that the assessment was predicated upon the amount of goods on hand on the 1st July, a time when in fact the least amount of goods would ordinarily be held by the merchant. The city ordinance so provides. He said he would not delay for an enquiry into such fact, deeming it immaterial, and would proceed to consider the question, whether there was any power in this tribunal itself, without the aid of a state court, to protect an injured citizen from a violation of his own state constitution, caused by the instrumentality and in direct pursuance of its own decree, specifically directing the exact thing to be done of which the citizen complains.

The objection of multifariousness he was glad had been waived by the defendants, otherwise it might present difficulties.

The judge remarked, during the argument, upon the general impropriety of tolerating a bill in equity by restraining proceedings upon a final decree. In a large majority of instances, he was confident such practice was improper. A summary motion upon petition or affidavit would ordinarily obtain all the relief required. Parties were at liberty in this instance, subsequently to shape their pleadings as they pleased, with a view of ultimate relief in the superior court. They could determine whether it would be better to go up on appeal under plenary proceedings in equity, or apply there for a *mandamus* to coerce, on the part of this court, the order which they ask to stay proceedings. He felt it his duty, in view of the practical difficulties in the way of the citizen's review, to afford every facility in the court's power to further the attempt. Liberty, therefore, would be given *nunc pro tunc* to change this proceeding, by bill, into a petition and motion to stay proceedings, as they should be advised.

He could have little doubt the court had full power to control the execution of its own final process, whenever advised, in any mode, that it involved a violation of local law.

The cases of Sims v. Guthrie, 9 Cranch; Riggs v. Johnson Co., 6 Wallace; Butz v. Muscatine, 8 Wallace; Mayor v. Lord, 9 Wallace; Dunn v. Clark, 8 Peters; Christmas v. Russell, 14 Wallace; Taylor v. Carryl, 20 Howard; Freeman v. Howe, 24 Howard; Buck v. Colbath, 3 Wallace; Jones v. Andrews, 10 Wallace, and other similar adjudications were referred to, and the doctrine deduced that whenever a specific act was ordered to be done, or particular property named was directed to be seized, the court had power to relieve an injured party from the execution of the order, or the consequences of the seizure.

The nature of the order in this case, and the acts complained of as having been performed under it, were referred to, and said to come within the principle of these decisions. They had not been referred to here, but there were still more applicable judgments in reference to staying proceedings on final process, paying money out of court, applications for relief in cases of receivers, and a large class of similar proceedings, where property was in *custodia legis*, and where the court took jurisdiction of rights, not on account of the citizenship of the parties, but auxiliary to the principal suit, which brought the thing into custody, and where, if the court did not act, the party would be remediless. He thought it would be a singularly constituted court if it had power to make an order, and had none to restrain its complete execution, when judicially informed that it involved a violation of the state constitution. He had no doubt the abstract power existed to afford the relief asked by the present application.

If it were found that the court had directed an assessment which was unlawful, an injunction would go, or the court would, by order, stay the proceedings and modify the rule for *mandamus*. The denial of the writ of *certiorari*, therefore, did not leave the citizen remediless. The scope of enquiry in this proceeding was broader still than it was in that. Every fact which had any tendency to sustain a defence, legal or equitable, to the assessment, might properly be made a part of such a record as that before him.

The fear was expressed that it would greatly impair the efficacy of this class of final process, if the rule were established that every irregularity

in the assessment of the tax, must result, as learned counsel for these complainants had contended, in an absolute cessation of all action on the part of the court, whose order was being executed, until a *certoriari* had been obtained by the tax payer, taken to the supreme court of the state, and there, at the will and leisure of the only litigant parties proper to such a proceeding, contested to the end. The suitor in this court would thus be delayed by judicial proceedings to which he was not a party, and over which his own tribunal had no control. A far better rule, and one he thought existing judgments justified, authorized this court to decide all such questions, for the purpose of executing its own process.

He should not take into consideration the rectitude of his brother Brown's order. That would be against the course of the court, unless new facts were presented. He saw no reason, however, to doubt its rectitude. Were it before him he would affirm it.

The question was fully presented, then, Do the bill and affidavits show the complainants have any grievance of which to complain?

He confessed it was with some doubt that he held that the law of 1873 was still in force for the purpose of collecting the present judgment. The facts were referred to at length. The making of the contract in reliance upon the law authorizing taxation per foot front to the full extent of the price to be paid, the fact that all parties then believed that the power of taxation existed, to enable the city to comply with its agreement, the justice and the reasonableness of the common expectation, based upon a public statute having all the forms of legislation, and the financial disappointment and distress resulting from its unconstitutionality, were considered.

The legislature, he said, in the performance of a high moral and political duty, had substituted the act of 1873 for the invalid law. It had honestly failed in its duty, misled and deceived the citizens into the expenditure of many hundreds of thousands of dollars, placed upon the streets and used by the complaining and other tax payers of Memphis. As a judge he felt disposed to accept this honest political action of the sovereign power. He would hold the new law where the legislature had placed it, exactly in the stead of their unconstitutional enactment. And, although quite aware none of the judgments upon this subject constituted precise precedents for such a ruling, he hoped a superior court would find in their principle a justification for treating this remedy as if it existed at the date of the contract. He proceeded to apply the principle in the class of cases he referred to to the exigencies of this case.

The judgments of Tennessee in respect to retrospective legislation were considered. They were thought to warrant the proposition, that where a remedy had once been accorded, the right to employ it existed, and especially where, as in this case, its employment had actually been entered upon, there was no power in the legislature to take away that remedy without the substitution of some reasonable mode of relief in its place. See Steamship Company v. Joliffe, 2 Wallace, 450.

The rule had been applied, and he thought justly, to a change of the remedy created after the inception of the cause of action.

It is the duty in all cases to follow the legislative intent. There can be no doubt it was most substantially the will of the legislature in the enactment of the law of 1873, to afford a remedy specifically for such cases as that before the court. So far as it had power, the object undoubtedly was to place citizens who had been wronged by its unconstitutional action, in the exact legal and financial condition they would have been had the legislature legislated rightfully in the outset, and passed the law of 1873, or a substitute for it, in place of that which had been declared void. The court which treats it differently, will war with the political policy of the state as clearly expressed by this statute. That for some unexplained reason this better policy changed, and the power of keeping promises was repealed, is of no consequence to this argument. If the right once existed to collect this judgment, then he thought a right application of principles laid down by the court of last resort, and the better reading of the state constitution, forbade an ill-timed repentance on the part of the legislature, and entitled the suitor in courts of justice to the remedies provided for the collection of his judgment, unless an equivalent and reasonable one was given in their stead.

If driven to the necessity, he thought that within the decisions, the power of taxation in the general mode provided by law, and to the extent required for its payment, ought necessarily to be implied from a new grant of power by the legislature to a municipal corporation to create a debt, where no other lawful provision was made for its payment.

In the two cases of Butz v. Muscantine, 8 Wallace, and Supervisors v. The United States, 18 Wallace, referred to by the complainant's counsel, he saw nothing at war with the liberty on the part of the court to make such an implication, while, in the case of the Loan Association v. Topeka, 20 Wallace, he saw what he understood to be an announcement of the doctrine. He thought also the decisions in Tennessee, (Nichol v. Mayor, etc., 9 Humph., and Memphis v. Memphis Gayoso Gas Company, MSS.), tended in the same direction. Judge Emmons considered at some length the facts relied upon to show that the taxation complained of was not uniform within the meaning of the state constitution. He saw nothing having any tendency to work such a consequence in the operation of these laws. In their practical administration it might well be that that slight degree of inequality, which could never be prevented in any system, might occur. This had many times been said to be a matter of legislative control, with which the courts should not interfere. The case in 21 Wallace, Bailey v. Clark he thought had no application to the meaning of the word "capital" as used in the constitution and revenue laws of the state of Tennessee. Did he, however, perceive some want of uniformity, and if the case cited were, in its principle, applicable to the laws now before him, it would be his duty, in construing a local statute and constitution, to follow the practical interpretation which all the executive and ministerial officers of the state had given them, without objection so far as he could see, since their adoption. The books both English and American, contain numerous judgments where such practical construction has been followed, when quite at war with the literalisms of the law. Especially have the courts said, where constitutions are adopted by the people, and the entire community have expressed their satisfaction with a particular reading by universal action under it, the courts will acquiesce in their judgment.

He understood the usage had been uniform in this regard in the state of Tennessee.

After the pronunciation of the preceding judgment a motion was presented by the counsel for the complainants, asking the entry of an order granting liberty to the complainants to take proceedings in the state courts to test the legality of the tax.

To this application Judge Emmons said:

"It would be inefficacious unless he stayed proceedings, for which order he had already decided no sufficient cause had been shown."

He did not see why the tax was not lawful. The order he thought would be unusual and improper. It could give no force to the state proceedings. It was not a matter for him to decide, but it had been said that the complainants had no remedy if they paid the tax, and the fact had been referred to as a reason for granting the present request, and remarked that he saw no reason why a remedy, as between the taxpayer and the corporation to recover the amount paid, should not be sought in the state tribunals. And if the tax was *unlawful*, he did not see why they might not have a remedy. If there was any answer to such a remedy—and he would not say it would not be an answer—it would be that the city officials were coerced to their action by the mandate of this court. If entirely confident such would be the consequence, it would make no difference in the present ruling.

This court has no right to abdicate its duty of deciding questions legitimately before it, because there is no other appellate tribunal to rejudge its judgments than the Supreme Court of the United States. In this case a review lies there.

He conceded cases might arise in which, from the greater fitness of a state tribunal to determine local questions, he would await action for the judgment of the state court. In an important case recently, such a course was taken in the district of Kentucky. But it was not circumstanced like this one. The question was novel; there had been no chronic action by the state in conformity with that about to be sanctioned by the court, and there was no danger of setting a precedent, which would weaken the general efficacy of proceedings to collect judgments in the tribunal whose action was stayed. He had no doubt of his power to stay proceedings, as requested. *That* he had already ruled. But he was entirely clear it would be an ill exercise of discretion, where citizens had for years submitted quietly to a system without objection, and who for the first time raised the question of power when it was sought to be exerted in favor of a suitor of the court. He could conceive of few cases where the duty was more plain, than in this, for the court to decide the merits, and not remit them to other suits, and courts over which it has no control.

NOTE.—After the above decision of Judge Emmons, the merchants applied to Judge C. W. Heiskell, of the Shelby Circuit Court, for writs of *certiorari* and *supersedeas* to stay the collection and test the legality of the tax that was being collected by the city tax collector, under and in pursuance of the *mandamus* from the Circuit Court of the United States.

The application being *ex parte*, the judge granted the writs applied for, and they were issued and served. The city appeared and moved to dismiss the proceeding because of a want of jurisdiction in the state court, the Circuit Court of the United States already having possession of the subject-matter.

The question was argued by the same counsel who argued the case before Judge Emmons, and also by S. P. Walker, city attorney.

The state circuit court sustained the motion to dismiss, Judge Heiskell delivering the following opinion:

The Merchants v. F. C. Schaper *et al:*

T. E. Brown, by a *mandamus* proceeding, obtained from the Circuit Court of the United States an order to the city government of Memphis to proceed to levy and collect a tax of fifty-four cents on the $100 worth of taxable property of the merchants, according to the returns of their property on file in the city collector's office.

Let it be observed that this judgment of the federal court ordered the levy to be made upon property "as already listed and returned." Observe again that this property—merchants' capital—had not been taxed, as had the other property of the city, to pay Brown's judgment. By this proceeding of *certiorari* petitioners seek to bring before the court and have quashed the distress warrants issued by the city tax collector in obedience to this *mandamus* proceeding. The question that meets the court *in limine* is that of jurisdiction. If this question is against petitioners, it is decisive of the case, and therefore should be first determined. Position of defendants is, that another court has taken jurisdiction of this matter, and therefore this court can not interfere.

To this petitioners reply: This court is not interfering with federal jurisdiction or process; it is only exerting its legitimate revisory jurisdiction over an inferior state tribunal to quash a void proceeding in the hands of a state officer. But how is this court to quash this proceeding—upon what ground? Upon no other than by determining that these warrants are wrongfully issued; that is, that the federal court erred in its judgment in issuing them. For if these distress warrants are void, it is because, as petitioners insist, they are levied upon property not subject to their levy. This is what the federal court determined; It determined that this property—the property levied on—is subject to this

levy; its judgment was to levy upon this property, so that it follows necessarily that if this court determines the warrants void, it pronounces upon the correctness of the federal court judgment.

Now, if that judgment is erroneous, how can this court or any other, except the federal courts, determine that question? Certainly the judgment of that court is not void. The most that can be said of it is, that it is erroneous and should be reversed. But this is not a revising court. And if it were to determine the question adversely to the correctness of that judgment, what would be the result? Only this—the federal court would enforce its mandate by proceedings of contempt against the city officers, if not against these petitioners themselves; and if this court enforced its judgments, we would have an unseemly conflict of jurisdiction in a system which would, and indeed almost always has, worked harmoniously.

It must not be overlooked here that the question involved is not whether this court will come in conflict with the federal court. It is whether it will come in conflict with any court of competent jurisdiction which has obtained jurisdiction of a cause. The rule is, that jurisdiction once obtained is retained until the judgments of the court have been fully executed, subject only to appeal or the injunction process of a court of chancery on some grounds of equitable interference, neither of which jurisdictions this court possesses in this case. The question would be the same if it were a *certiorari* to a sister state tribunal to bring up some process issued in obedience to a judgment of a chancery court in a like case with the one at bar.

It would be the same if this court had jurisdiction of this cause, and the federal courts were to attempt an interference under like circumstances. But those courts have always scrupulously recognized the principle of non-interferance with the jurisdiction of state tribunals in such cases as the one at bar, and propriety, policy and principle demand of state courts a like observance of it. It is needless to express an opinion upon the merits of this controversy, as this disposes of the case. The court has no jurisdiction, and to attempt to take it, would be an ungracious, unwarranted, as well as a futile act. Let the *supersedeas* be discharged, and the petition dismissed.

C. W. HEISKELL,
Judge, etc.

The merchants thereupon appealed from the judgment of the state circuit court, dismissing their petition to the Supreme Court of Tennessee.

T. E. Brown, the plaintiff in the judgment for the payment of which the tax was being collected, thereupon applied by petition to the Circuit Court of the United States, stating the proceedings that the merchants had taken in the state circuit court, and praying that such proceedings might be had as were necessary to vindicate the jurisdiction and process of the Circuit Court of the United States, and secure his rights. He made a certified copy of the proceedings in the state circuit court a part of his petition.

The merchants appeared by counsel before the court without the issuance or service of process, and the court, Judge Emmons presiding, after hearing the matter, adjudged that the application that had been made to the state circuit court, and the use that had been made of its process, was a contempt of the Circuit Court of the United States. And he thereupon ordered that the merchants should at once discontinue and abandon their proceedings in the state circuit court, and on the appeal, so far as they attempted or had the effect to stay or interfere with the collection of the tax which was being collected under the *mandamus* from the Circuit Court of the United States. And thereupon the merchants agreed in open court to abandon and dismiss their several writs of *supersedeas*, and that they would neither take nor claim the benefit of a *supersedeas* to the judgment of the state circuit court dismissing their petition, and that their several appeals should have the effect, and only the effect, of writs of error without *supersedeas*, and that they would go into the state circuit court and put of record an agreement to the above effect. The court then dismissed the further prosecution of the proceedings for contempt, at the cost of the merchants, and on their application granted them permission to apply to the state supreme court for a *supersedeas* to the judgment of the state circuit court dismissing their petition, whenever the Supreme Court of the United States, to which they propose to carry the case decided by Judge Emmons, may decide that the Circuit Court of the United States has not, or that the state circuit court has, jurisdiction of the matters presented by the proceeding in the state circuit court, and that their application in that event should not be taken as a contempt of the court.

Brett v. Carter Reviewed.

The case of Brett v. Carter, United States District Court, Mass., 3 CENT. LAW JOUR. No. 18, p. 286, involves points upon which the authorities are very conflicting, and admits of some comments additional to those contained in the opinion of the learned judge by whom the decision was made. The two points decided are, that a mortgage of chattels which permits the mortgagor to continue in possession, and to sell the goods in the ordinary course of business, is not void *per se*, but whether there is a fraud in the particular case, is a question of fact, and that a mortgage of after-acquired chattels is valid. The facts of the case are thus stated: Bill in equity by the assignee in bankruptcy of one Osborne N. Sargent, against a mortgagee of the stock of stationery and other similar goods. It appeared that in November, 1874, Sargent bought out the stock in trade of the defendant Carter, as carried on by him in a certain shop in Beacon street, Boston; and on the same day gave back a mortgage to secure the payment of the purchase-money by installments, represented by promissory notes extending over a period of four years. The mortgage conveyed the stock "and any other goods which may from time to time during the existence of this mortgage be purchased by the grantor and put into said store to replace any part of said stock which may have been disposed of." Among the covenants was one, that if the stock should be diminished "faster than said sum hereby secured is paid, said grantor is to furnish further security for said sum, whenever required by said grantee."

Two of the notes were duly paid, but one that came due in November, 1875, not having been paid in full, the defendant demanded further security, and a mortgage was given of such stock as had been acquired during the year. This was about two weeks before the petition in bankruptcy was filed, and the theory of the bill was that it was a preference. The complainant afterwards asked leave to amend, and alleged the first mortgage to be void on the ground that the mortgagor was tacitly permitted to sell all the goods in the ordinary course of his trade.

The defendant insisted that both mortgages were valid.

In this state of facts, the first point of conflict relates to the *form of proceeding*, which was a bill in equity. The question whether this was the proper remedy does not appear to have been raised, and yet, both upon general principles, and under the express decisions of the Massachusetts Supreme Court, it would seem to have been an open one. Judge Story says, "A court of equity has jurisdiction in cases of rights, recognized and protected by the municipal jurisprudence, where a plain, adequate and complete remedy can not be had in the courts of common law." 1 Story Eq. 32, § 33. In two very similar cases in Massachusetts, arising under the insolvent law, bills in equity were dismissed for want of jurisdiction

In Thayer v. Smith, 9 Met. 469, an assignee in insolvency brought a bill in equity to set aside an alleged fraudulent mortgage. Shaw, C. J., says: "The plaintiffs set out a complete title to the estate. . . . The same proof, which would support the bill, would sustain a real action; . . . nothing can more effectually clear the title of all cloud, than the judgment of a court of law upon the very question of title." The bill was accordingly dismissed.

In the subsequent case of Woodman v. Saltonstall, 7 Cush. 181, an assignee brought a bill in equity to set aside an alleged fraudulent absolute conveyance made by the insolvent. The same distinguished judge says: "The only distinction suggested . . . between that case (Thayer v. Smith) and the present, is, that here the bill prays for a discovery. . . . If the plaintiff's remedy is properly at law, a discovery may be had in aid of his other evidence. Cases may be imagined, indeed, where the interposition of chancery powers would be desirable; as where the title had gone through several changes, and several parties were insolvent. . . . But where no transfer has been made . . . the proper remedy is by a common writ of entry against the grantee." And this bill was also dismissed.

Without specially referring to the general equity jurisdiction of the district court, or any clauses of the bankrupt laws which conferred such jurisdiction, it will be sufficient to say, that it could not be more ample than that conferred by § 180 of the Massachusetts Insolvent Law, in the following terms: "The supreme judicial court shall have general superintendence and jurisdiction as a court of chancery, of all cases arising under this act . . . and they shall also have power in all cases which are not herein otherwise specially provided for . . . to hear and determine the case, as a court of chancery, and to make such order and decree therein as law and justice shall require." And it is equally manifest that in the case now under consideration the plaintiff had a perfect remedy at law. If the bankrupt, as it would seem, was in possession of the goods, the assignee could take them by a simple order of court, or, if necessary, by an action at law. And so, if the mortgagee was in possession, either replevin or trover could clearly be maintained.

Upon the former of the two interesting and important points decided in Brett v. Carter, notwithstanding the formidable array of contradictory authorities, the strong tendency of the law now is, to treat the question of fraud as one of fact for the jury, and not of law for the court. Many of the cases cited by Judge Lowell fully sustain his conclusion upon this part of the case. Upon the latter question, relating to the validity of a mortgage of property to be afterwards acquired, so far as the attempt to transfer such property is set up as evidence of fraud, this decision in the negative is also conformable to the weight of authority. But, upon the more abstract and technical point, that such transfer is invalid, irrespective of fraud, the remark of Judge Lowell concerning the court in Massachusetts, "I am not prepared to say that if the supreme judicial court were now asked to review their decision in Moody v. Wright, it is at all certain they would not reverse it," is not borne out by the latest case in that court. This is the case of Low v. Pew, 108 Mass. 347, where the former doctrine of the court, with reference to the attempted sale of property to be subsequently acquired, seems to be very distinctly affirmed. This case also involved proceedings in bankruptcy, though not directly material to the question at issue. It was a sale of "all the halibut that may be caught by the master and crew" of a certain schooner "on the voyage upon which she is about to proceed," at so much per pound, to be delivered as soon as the schooner arrives upon her return, with an acknowledgment of the receipt of $1,500 in part payment. The sellers subsequently becoming bankrupt, and the schooner returning with the fish after such bankruptcy, the assignees took possession, and the alleged buyers replevy the halibut from them, after tendering the balance of the contract price. It was held that the action could not be maintained. The transaction was an actual sale, not a mere executory contract, but it was a sale of "a mere possibility or expectancy of acquiring property, not coupled with any interest," and was distinguished from the case where the seller has a potential interest in the thing sold. Thus a man may sell the wool to grow upon his own

sheep, but not upon the sheep of another; or the crops to grow upon his own land, but not upon land in which he has no interest. So "an assignment of future wages, there being no contract of service, was held invalid." . . . That, "if a person is under a contract of service, he may assign his future earnings." The case is also distinguished from the cases of Gardener v. Hog, 18 Pick. 168, and Tripp v. Brownell, 12 Cush. 376 where the lay or share in the profits, which a seaman in a whaling voyage agreed to receive in lieu of wages, was held assignable, such assignments not being of any part of the oil to be made, but of the debt which would become due at the end of the voyage, on the assignment of a chose in action.

There is another recent case of high authority which sustains Judge Lowell's view as to the *result* of a mortgage of future property, though apparently admitting the mortgage itself, as such, to be invalid. In Brett v. Ellett, 19 Wall. 544, Tillers, in January, leased a plantation to Graham for one year, taking a note for the rent, and also embodied in the lease a mortgage of all the crops raised on the plantation in that year. In June, Ellett, having recovered a judgment against Tillers, sold the plantation at sheriff's sale, and bought it, and Tillers transferred to him the note. In November, Graham transferred the crop to Brett & Co., his creditors; whereupon Ellett filed a bill against them to charge them, as trustees for him, with the proceeds of the crop. It appeared that the defendants had notice, both before and after the transfer to them, of the terms of the lease. The evidence showed that planting never began in Mississippi earlier than March. In affirming the decree for the plaintiff, the court say: "The mortgage clause . . . could not operate as a mortgage, because the crops . . . were not then in existence. When the crops grew, the lien attached, and bound them effectually from that time. . . . The cotton in question was one of those crops. Ellett, having bought the premises, became clothed with all the rights of Tillers, touching the rent. . . . The appellants had full notice. . . . They read the lease. . . . Ellett also notified them. . . . The cotton went impressed with his lien into their hands." *Per* Swayne, J. Id. 547. This case would seem to go to the length of deciding that a mortgage of future property may take effect as an equitable lien, even against a party claiming under a transfer subsequent to such mortgage, but prior to any acts of the mortgagee in asserting his title. In this respect, the case goes beyond most others on the subject, which, while denying the validity of the mortgage as an executed transfer, make it the valid foundation of a claim for specific performance, or a taking of the property by the party's own act. Such cases generally recognize the priority of any intervening schedule claim.

In this connection it may be remarked that there seems no little confusion in some of the cases as to the respective rules of law and equity concerning the conveyance of future property. Considered as an executed transfer, such conveyance would seem to be either valid or invalid alike in both tribunals. In the case commented upon, occasional references are made to the fact that it was a proceeding in equity. Why a bill in equity was elected as the remedy does not very clearly appear. The suit was brought for the purpose of *avoiding* the mortgage, and some intimations of the court indicate that a suit at law might have been maintained. If the former objection materially affected the rights of the parties, the chances of the plaintiff were certainly better at law than in equity.

Assuming that a bill in equity was the proper remedy, it is further worthy of notice, that in this form of proceeding, if our bankrupt law would admit the construction given to the English law, the court might well have reached the conclusion arrived at, and even independently of the reasons about which there is so much conflict of authority. The proceeding was a bill in equity, predicated upon the ground that the conveyance of the after-acquired property was a *preference*, being made only two weeks before the bankruptcy. The transaction being only a compliance with the terms of the original mortgage, the maxim, that he who would have equity must do equity, is certainly applicable, to avoid the effect of an objection purely technical. And, even at law, payment of a debt, made in pursuance of an agreement at the time it was incurred, is held in England not to be a preference. Hunt v. Mortimer, 10 B. & C. 45. Littledale, J., says, p. 46: "This payment was not voluntary, but the subject of especial contract made before the money was lent." Acc. Potts, Crabbe, 469. A contrary decision was made in a construction of the Massachusetts insolvent law, but wholly predicated upon the language of the act "when the agreement for such security is part of the original contract and the *security is given at the time of making such contract.*" Blodgett v. Hildreth, 11 Cush. 313. The words of the present bankrupt law are perhaps somewhat less explicit, "Nothing in said section shall be construed to invalidate any loan of actual value, or the security therefor . . . upon a security taken . . . on the occasion of the making of such loan." Bump. 791. The construction, however, seems to have been the same as that of the Massachusetts act. Smith v. Ely, 10 B. R. 553; Eldridge, 4 Ib. 598; Robinson v. Elliott, 11 Ib. 553, and may probably be now regarded as settled law.

The analysis of the cases relating to the transfer of future property shows that they include very different classes of facts, though involving substantially the same principle. Perhaps the most frequent transaction has been the mortgage of a *stock of goods*, treating the stock, present and future, as an integral thing, and the validity often depending upon the questions, whether there was an agreement to render accounts, or to make further advances, or whether the new goods were simply to replace the old ones, not causing any substantial increase. *Agricultural property* has often been mortgaged in the same way, as in the case of crops and animals. The civil law seems to have allowed unbounded latitude in the transfer of a *flock*. "*Grege pignori obligato, qua postea nascuntur, tenentur. Sed et si capitibus decedentibus totus grex fuerit renovatu pignori tenebitur.*" Dig. lib. 20, tit. 1, § 13. A very noticeable case is Morrill v. Noyes, 56 Maine, 458, where a mortgage of a railroad included also the cars and engines, and those subsequently placed upon the road were held to pass. It was intimated that a contrary decision would have been given, if the moveable property had been mortgaged without the road, and importance was also attached to the fact that the cars and engines were fitted to the track. And it has sometimes been found necessary to adjudicate, or, at least, to state by way of illustration, that the change in a single article by *accession* as in cases of the lock of a gun, the crystal of a watch, or the strings of a violin, would not impair a previous lien. On the whole, the maxim "*qui non habet, ille non dat*" may be regarded as well nigh absolute. In old times, one man could sell another's property, if only done in *market overt*, but not property to be subsequently acquired by himself; now *market overt* is unheard of, but an expectant owner may in general sell or mortgage that which he has not now, but expects or hopes to have in the future. F. H.

Book Notice.

ANGELL ON LIMITATIONS.—Limitations of Actions at Law and Suits in Equity and Admiralty. Appendix with English and American Statute of Limitations. By J. K. Angell, *Sixth Edition*. Revised and Greatly Enlarged. By JOHN WILDER MAY, Author of "Law of Insurance." Boston: Little, Brown & Co. 1876.

Mr. Angell's treatise is the standard work on the subject. It has stood the test of professional examination and has maintained its favor in the professional estimation for thirty years. It was a complete work when it was first written. It is still a valuable treatise. It is not, however, even in this edition a complete mirror of the present state of the law. We do not mean that every case ought to be cited. But as between the fault of redundant citation and the opposite fault, the former is to be preferred. Cases merely cumulative, and especially where they simply recognize and follow cases previously decided in the same state, may well be omitted. But in an American treatise designed for general use in *all* the states, the leading and well-considered cases in those states ought to be referred to, and on such a topic as Limitations of Actions, this is entirely practicable. One of the faults of the present edition has doubtless grown out of the delicacy of the present editor in interfering with the text of the lamented and distinguished author, even when that interference was to consist simply in *additions*. But the law as it exists to-day has on many points outgrown the text of Mr. Angell, and if Mr. Angell's treatise is to continue to hold the field, the next edition ought to be committed to the learned editor with full power to bring to it that industry and learning that characterize his own volume on the Law of Insurance. We miss anything like an adequate discussion or treatment of several important subjects. We may mention one or two. The effect of a state of war, and particularly of the recent civil war, upon the statute of limitations, as between citizens of the opposing parties,—when it runs—what will take the case out of the operation of the general rule—the suspension of interest, etc., etc., are subjects that have been authoritatively determined in more than a dozen cases in the Supreme Court of the United States. The brief allusion to the important matter in a note on p. 205 is very inadequate. Again, it is a very important question how far municipal and public corporations, as the representative of delegated portions of the power of the state, are within the operation of ordinary limitation statutes. The reports contain many cases on the subject—leading and well-considered cases,—yet we find but few of them referred to or even cited. We miss, also, important cases relating to written acknowledgments and new promises, and the effect of part payment. Neither can we commend the wisdom of retaining, in an appendix of 188 pages, the old, and, in many cases, obsolete legislation of thirty years ago. Since the year 1846, the date of Mr. Angell's second edition, these statutes have to a great degree ceased to be what, according to his preface they were then, "valuable as containing the results of later and more enlightened and suitable legislative action." They have been, for the most part, revised, re-written, changed in language, or in context; and it is difficult to see what useful purpose can be subserved by retaining them in the appendix of a modern text-book. We did not, however, set out to find fault. With a book of such merited usefulness as the present, we feel more free to point out minor defects, as those we have mentioned, than we otherwise would. And the suggestions we have made are rather with a view to a future edition than for any other purpose. The treatise is one of Mr. Angell's best, and there is no substitute for it in this country.

Notes of Recent Decisions.

Bank Check—Holder must Present in Reasonable Time.—*Woodruff v. Plant*, Supreme Court of Errors of Connecticut. Opinion by Foster, J. 15 Am. Law Reg. (N. S.) 145. The holder of a bank check is bound to present it within a reasonable time, otherwise the delay is at his own peril. But what is a reasonable time must depend upon the particular circumstances of the case. And the time may be extended by the assent of the drawer, express or implied. The plaintiff, desiring to make a remittance to a creditor at a distance, and there being no bank in the place where he lived, asked the defendant, who had an account with a banker in a neighboring city, to take the amount of him in bank bills and give him his check therefor, and the defendant, fully understanding the object, took the bank bills and gave the plaintiff his check upon the banker, payable to the plaintiff's order, the defendant the same day depositing the bills with the banker. The plaintiff at once endorsed the check to his creditor and sent it by the next mail. It was

three days before the check reached the place where the banker resided and was presented for payment, at which time the banker had failed and payment was refused. The plaintiff, having taken up the check, sued the defendant thereon. *Held*, that the check was presented within a reasonable time in the circumstances, and that the defendant was liable. The case could not be regarded as one of bailment. Cases cited in argument: 1. To the point that the check was presented for payment within a reasonable time. Bridgeport Bank v. Dyer, 19 Conn. 136; Daggett v. Whiting, 35 Id. 360; 1 Parsons' Notes and Bills, 271; 3 Kent Com. 104, note *c*; Taylor v. Wilson, 11 Metc. 44; Ames v. Merriam, 98 Mass. 294; First Nat. Bank v. Harris, 108 Id. 514; Morrison v. Bailey, 5 Ohio St. 13; Mohawk Bank v. Broderick, 13 Wend. 133; Stephens v. McNeill, 26 Barb. 652; Rickford v. Ridge, 2 Campb. 537; Alexander v. Burchfield, 7 M. & G. 1061; Robinson v. Hawsford, 9 Ad. & E., N. S. 51; Hare v. Henty, 10 Com. Bench, N. S. 64; Prideaux v. Criddle, Law Rep. 4 Queen's Bench, 454. To the point that the check was not presented in season: 2 Parsons' Notes and Bills, 73, 79; Chitty on Bills, 385 *et seq*; Story on Bills, § 494; Byles on Bills, 20: Harker v. Anderson, 21 Wend. 372, Chapman v. White, 2 Seld. 412; Smith v. Miller, 43 N. Y. 173; s. c. 52 Id. 545. The following note is appended to the case by the learned editor, the late Judge Redfield: "There is little question in regard to the soundness of the rule laid down in the foregoing opinion, but every new illustration of the rule, by a different state of facts, is useful. A bank check is more analogous to an inland bill of exchange, payable at sight, than to any other of the familiar securities of the old books, and, like most other negotiable securities, when of comparatively recent origin, will naturally establish rules peculiar to its own uses, and with reference to the common practices of business men in regard to it. In Ames v. Merriman, 98 Mass. 294, Bigelow, C. J., treats a check as strictly analogous to a note, or bill accepted payable on demand, and gives no intimation of any distinction in the two cases, in regard to the reasonable time for presentment. In Nat. Bank v. Hanee, 108 Mass. 514, Chapman, C. J., follows the former case without comment. In strictness, checks are bills payable at sight; and, although the elementary treatises seem to regard notes and bills accepted, payable on demand and at sight, as resting upon the same grounds, as to what is reasonable time for presentment. Story on Promissory Notes, § 207 *et seq.*; Chit. on Bills, ch. 7, pp. 303 *et seq.* Yet in practice, we apprehend that the holder of a check would, ordinarily, be expected to present it for payment sooner than in the case of a bill or note payable on demand; and it seems to us not quite certain there is not implied the necessity for more diligence in presenting securities, payable at sight, where the presentment is required to fix the responsibility of the drawer, than there is where the obligation is fixed and no demand is necessary to perfect the cause of action; but it is governed so much by the peculiar circumstances, that no general rule can be even approximated. In Smith v. Miller, 43 N. Y. 172, it was held that where the plaintiff accepted a check in lieu of a draft, he must present it the same day."

Common Carriers—Valuation of Goods on Bill of Lading—Construction of Written and Printed Stipulations at Variance with Each Other.—*Elkins v. Empire Transportation Company*, Supreme Court of Pennsylvania. 2 Weekly Notes, 403. N. shipped goods by a transportation company, taking for them a bill of lading in which a certain valuation, far below the actual value for the goods, was written, whereby they were carried at a reduced rate. The bill of lading also contained a printed clause that in case of loss the cost or value of the goods at the place of shipment should be taken; the bill of lading was transferred to E. as collateral for a draft drawn for the full value of the goods, and accepted and paid by E.; the goods while in transit were lost through an accident. In an action by E. against the carriers: *Held*, that E. was bound by the valuation written in the bill of lading. *Held further*, that, when the written and printed stipulations of a contract are at variance, the written must govern.

Policy of Insurance—Condition Limiting Time for Bringing Suit.—In the advance sheets of the 21st Minnesota Reports we find the following decision on the above point. *Chandler et. al. v. St. Paul Fire and Marine Ins. Co.* The policy provided for the payment of losses within sixty days after due notice and satisfactory proof of the same, and contained the following condition: "It is expressly covenated by the parties hereto, that no suit or action against the company, for the recovery of any claim under or by virtue of this policy, shall be sustained in any court of law or chancery, unless commenced within the term of one year next after any claim shall occur; and in case such suit or action shall be commenced against the company, after the end of one year next after such loss or damage shall have occurred, the lapse of time shall be taken and admitted as conclusive evidence against the validity of the claim thereby attempted to be enforced, any statute of limitation to the contrary, notwithstanding." The court held that the assured were entitled to a year after the furnishing of proofs, if not to a year from the date when the loss became payable, in which to bring suit. The court held that the words, "claim shall occur," meant shall "arise, or accrue." The giving of notice, and the furnishing of satisfactory proofs, are conditions precedent to be performed by the assured before they are entitled to claim the stipulated indemnity; and not until sixty days after the performance of the last of these conditions, can their claim be enforced by suit. It is unnecessary to determine whether by the first breach of the condition the time of limitation began to run from the furnishing of proofs, or sixty days thereafter. It would seem, however, that the claim exists when notice has been given and proofs furnished, although it is not payable until the expiration of the sixty days. The second branch of the condition as clearly provides that unless suit is brought within one year after the occurrence of the loss the lapse of time shall be conclusive evidence against the validity of the claim. These two limitations can not stand together. By the first, an action might be sustained if commenced within one year of the furnishing of proofs of loss, sixty days after the loss occurred; but by the second lapse of time would be a conclusive bar to such action, if brought a day after a year from the date of the fire. During the interval, an action might be maintained under the first limitation, but must be defeated by the second. The two branches of the conditions being thus inconsistent, and the whole being ambiguous, its meaning can only be ascertained by a resort to construction. The language of the condition is the language of the company, and for any ambiguity in its terms the company is responsible. If the company has seen fit to express itself in terms that require interpretation, it can not complain if any doubt as to the meaning of the condition is resolved in favor of the assured. The rule that words are to be taken most strongly against the party using them, is more applicable to the conditions and provisos of policies of insurance than to almost any other instruments. These policies are wholly prepared by the company issuing them, and should be drafted with the most scrupulous exactness. They should be absolutely free from ambiguity. "A policy ought to be so framed that he who runs can read. It ought to be framed with such deliberate care that no form of expression by which, on the one hand, the party assured can be caught, or by which, on the other hand, the company can be cheated, shall be found upon the face of it." Anderson v. Fitzgerald, 4 H. of L. Cas. 484, 510. This rule has been adopted in many cases involving the construction of exceptions, warranties and conditions precedent in policies. See Blackett v. Assurance Co., 2 Crompt & Jer. 244, 251; Notman v. Anchor Assurance Co., 4 C. B. N. S. 476, 481; Fitton v. Accidental Death Ins. Co., 17 Id. 122, 135; Braunstein v. Acc. Death Ins. Co., 1 Best & Smith, 782, 799; Fowkes v. Assurance Ass'n, 3 Id. 917, 925; Catlin v. Springfield Fire Ins. Co., 1 Sumner, 434, 440; Palmer v. Warren Ins. Co., 1 Story, 360,364, 869; Bartlett v. Union M. F. Ins. Co., 46 Me. 500; Wilson v. Conway Fire Ins. Co., 4 R. I. 141, 156; Wilson v. Hampden Fire Ins. Co., 4 Id. 159, 366; Hoffman v. Ætna Ins. Co., 32 N. Y. 405, 413; Reynolds v. Commerce Fire Ins. Co., 47 N. Y. 597, 604; N. Y. Belting Co. v. Washington Fire Ins. Co., 10 Bosw. 428, 435; Merrick v. Germania Fire Ins. Co., 54 Penn. St. 277, 284; Western Ins. Co. v. Cropper, 32 Id. 351, 355. Such a condition is valid, (Reddlesbarger v. Hartford Ins. Co., 7 Wall. 386), but like other conditions subsequent, which work forfeitures of vested rights, it is to be construed strictly against the company, and liberally in favor of the assured. A defence founded on the breach of such a condition as this is *stricti juris*. This construction of the condition, highly reasonable in itself, is supported by the decision in The Mayor of N. Y. v. The Hamilton Fire Ins. Co., 39 N. Y. 45, cited with approval in Killips v. Putnam Ins. Co., 28 Wis. 472, 484, although the latter case was decided on other grounds.

Slander of Persons Holding Office.—In the same volume of reports will be found a decision on this subject. *Gove v. Blethen.* The defamatory words were spoken of a justice of the peace, in the execution of his office. The words were as follows: "Gove perjured himself in deciding the suit of Whitcomb against me, * * * and I will be d—d if I will believe him under oath, for he has decided against me contrary to all law and evidence, and it is the G—d d—est erroneous decision I ever saw any justice give, and it was a d—d outrage, and it was done for spite." *Held*, 1, that in order to render defamatory words actionable, in themselves, when spoken in reference to the official character or action of a person holding an office of profit, it is not necessary that they should charge a crime; it is sufficient if they charge incapacity, or want of integrity, or corruption in the officer. 2. That the words in question charged the plaintiff with having (a) violated his official oath, (b) made a corrupt and malicious decision against the defendant in the case referred to. There are two classes of defamatory words for which an action may be sustained: *first*, words which are actionable in themselves; *second*, those which become so, in consequence of some special damage which they have caused. Whether words are actionable in themselves, or not, depends, among other things, upon whether they are spoken of a person individually, or spoken of him in relation to his business, profession or office. It may be laid down as a settled rule, that slanderous words spoken of a person in an office of profit, and relating to him in such office, importing a charge of unfitness, either in respect of morals or capacity, for the duties of such office, or a want of integrity, or corruption therein, are actionable *per se*. Bacon's Abr. Slander, B. 3; 3 Bl. Com. (Cooley,) 123, note; 1 Starkie on Slander, 181; Stephen's Nisi Prius, 2555; Dole v. Van Rensselaer, 1 John, Cas. 330; Hopkins v. Beedle, 1 Caines' Rep. 347; 2 Chitty Pl. 641, note *l*. In order to render words actionable *per se*, when spoken in reference to the official character or action of a person holding an office of profit, it is not necessary that they should import a crime, but that it is sufficient if they charge incapacity, or want of integrity, or corruption, in the officer. The reason for this rule seems to be this: When an office is lucrative, words which reflect upon the integrity or capacity of the officer, render his tenure precarious, and are therefore a detriment in a pecuniary point of view. 1 Starkie on Slander, 118.

There can be no doubt that words spoken in this case are in themselves actionable, and are within both the reason and letter of this rule. The charge that the plaintiff perjured himself in deciding the suit referred to against the defendant, while it does not charge a technical perjury, does charge that the plaintiff violated his official prommissory oath. Gen. Stat., ch. 9, § 2. A charge of this nature is in itself actionable. Hopkins v. Beedle, 1 Caines' Rep. 347; Aston v. Blagrave, Strange, 617; Rex v. Pocock, Id. 1157; Kent v. Pocock, Id. 1158; 3 Burns' Justice, 18th Ed. 29. But the words spoken in this case go further.

They charge against the plaintiff, not only a violation of his official oath, but that the decision was erroneous, contrary to all law and evidence, and rendered against the defendant for spite. A decision of this character must necessarily be corrupt and malicious. If made by a justice of the peace in a case of which he had jurisdiction, it would constitute an offence against public justice, for which he would be liable to indictment and removal from office. 4 Bl. Com. 141; Russell on Crimes, 45,135; People v. Coon, 15 Wend. 277; Gen. Stat. ch. 91, § 8; ch. 9, § 2. The words, therefore, charge not only corruption, and a want of integrity, against the plaintiff, but also a criminal offence.

Legal News and Notes.

—The Supreme Court of Illinois will meet at Mount Vernon, on Tuesday, June 6th.

—"The sparks of all sciences in the world," said Sir Henry Finch, "are taken up in the ashes of the law."

—Last week in the New York Court of Common Pleas an application was made to have the injunction, lately granted against the elevated railway, modified. Judge Daly refused to grant the modification, holding that the decision of the chief justice was final. In deciding, Judge Daly said he had heard a great deal about horse-car poetry lately, but he had in his possession something which he thought would far surpass any effort in that direction ever before made. It was, he said, an anonymous letter which had been sent to the judge of the court. The following is the epistle:

Sir:-The people, the masses of your constituents, desire and demand rapid transit. You set your opinion against public opinion. When you place yourself before us again, we will show you that we detest the judge who is not for the people. An Anti-party Man.

Judge Daly, after reading the above brilliant effusion, said, although he appreciated the danger of so doing, yet he would nevertheless refuse to grant the modification asked for.

—The Supreme Court of New York has lately held that the clause in the policies insuring the deceased during the term of his natural life, being inserted before the condition as to payment of accrued premiums, a non-payment of premiums would not void the policies if the breach of the condition resulted from causes beyond human agency, and with reference to which the parties are supposed to have contracted. The court cited a case where sickness was held to be an act of God, and a valid excuse to prevent a forfeiture. In the case under consideration the plaintiff was insane when the premiums became due. The court therefore decided that the inability and omission not being caused by his own act, it would be harsh and inequitable to distinguish between this case and the other. Insanity which destroys all mental capacity is no less a consideration than physical disability to void a forfeiture, and appeals with equal force for equitable relief *ex rigore juris*.

—Rules Concerning Relevancy.—Mr. Whitworth, an English barrister, finding that the hypotheses put forward by Mr. Stephen in his introduction to the evidence act—that relevancy is the connection of events as cause and effect—was not sufficient to support the rule which the law prescribes, has considered what was wanting in the hypotheses, and has discovered a theory of relevancy which he deems perfect. The following are the rules propounded by Mr. Whitworth:

Rule I.—No fact is relevant which does not make the existence of a fact in issue more likely or unlikely, and that to such a degree as the judge considers will aid him in deciding the issue.

Rule II.—Subject to Rule I., the following facts are relevant:—

1. Facts which are part of, or which are implied by, a fact in issue; or which show the absence of what might be expected as a part of, or would seem to be implied by, a fact in issue.

2. Facts which are a cause, or which show the absence of what might be expected as a cause, of a fact in issue.

3. Facts which are an effect or which show the absence of what might be expected as an effect, of a fact in issue.

4. Facts which are an effect of a cause, or which show the absence of what might be expected as an effect of a cause, of a fact in issue.

Rule III.—Facts which affirm or deny the relevancy of facts alleged to be relevant under Rule II. are relevant.

Rule IV.—Facts relevant to relevant facts are relevant.

—The Winslow Case.—Winslow has been again remanded by the British government, and the correspondence on the subject is to be laid before Parliament. Mr. Fish's note appears to have completely shattered the opinions of the law officers of the Crown upon the effect of the extradition act of 1870, and thoroughly exposed the weakness of the position taken by the British government. The leading papers, which previously strenously advocated the theory that the act should be the sole guide of the law officers, have changed their ground. *The Standard*, the organ of Mr. Disraeli's administration, says: "On two points it seems perfectly certain that Mr. Fish is in the right, while on the third, the construction of the act of Parliament of 1870, his view is that which to mere unprofessional common sense the words in question appear to bear out." The *Pall Mall Gazette* says: "In the last resort it is a question not for law officers, but for law courts, and there are recognized means of raising it in the latter for their decision. Our government will not be wholly free from responsibility to the United States until this question has been so raised and decided." It therefore recommends that the question be referred to the Court of Queen's Bench. A special dispatch from London to the New York *Herald*, is to the effect that England's last note abandons the objection to the surrender of Winslow based upon the British act, and relies only upon the treaty, arguing that the treaty gives implied stipulation that the prisoner is liable for the "extraditable" offence only. And thus the matter stands at present.

—The Lawyers Holiday.—The St. Louis *Globe-Democrat* says that the early beginning of hot weather has set the lawyers to thinking about cool spots in which to pass the ensuing dog-days. The profession has a partiality for rocky retreats, and the blacker the stones the more attractive are they. Preparations are being made for the June term of the circuit court, and agreements for continuances will be numerous. Many, no doubt, have decided upon the route they will take, but very few will decline an invitation to visit Fee Fee Church. Judge Knight will go where the days are short, and Mr. Day where the nights are long. Mr. Lackland will not lack for land to travel over. Judge Clover will make hay at home, and Mr. Glover will be hand and glove with his clients. Mr. Brown will rejoice in green fields, and Mr. Green in Brown hills. The Taylors will go on a goose hunt, and Mr. Turner will turn himself loose in the Ozark Mountains. Mr. Sapp will run in the sugar-tree groves. Mr. Bragg may turn up at Poker Flat, and Mr. Mead at the Meadows. The junior of the firm of Dryden & Dryden, will make a call at Papstown, and Mr. Tittman will look at some convenient nursery. Mr. Crane will stretch his legs at Bird's Point, in company with Mr. Martin and Prof. Swallow. Mr. Bowman will practice archery on the side of a Hill. Col. Crewes will keep his log in Franklin county, and Mr. Overall will travel all over the centennial grounds. Mr. Strong has a weakness for rural life. Mr. Lightburne will burn a light in his office for Mr. Lighthizer. Mr. Mellon will gather cantelopes, and Mr. Musser will keep out of musses. Mr. Cline will not decline a fee, nor will Mr. Thoroughman be a man of thorough selfishness. Judge Treat will imbibe the mountain dew of York state, or Colorado, and will place the whiskey ring in the hand of another. Whatever circuit our lawyers may please to take, or in whatever district they may appear, they will no doubt conduct themselves, in all cases, with dignity and propriety, and receive a favorable verdict for men of sound judgment.

—Scotch Law Courts.—On entering the Scotch law courts, one is reminded of those at home—save in one marked improvement. Most people know the irreverent and slovenly way in which the oath is administered to English witnesses. The witness hurries into the box, and while judge and jury and the spectaters are chatting and rustling in a pause of the business, the clerk of the court hands him a small Bible, which he holds in his right hand. The officer then recites his mumbled formula—"The evidence you shall give to the court and jury, touching the matter in question, shall be the truth, the whole truth, and nothing but the truth. So help you, God!" The witness, without uttering a word, ducks his head and puts his lips to the Bible cover—unless he is cunning and ignorant enough to evade the ceremony by kissing his thumb. Now, in Scotch courts the procedure is far more dignified and impressive. When the witness appears, the judge himself rises from his seat, and raising high his right hand, looks fixedly on the offerer of the evidence, who, as instructed, also raises high his arms, and looks the judge in the face. The judge then, amid general silence, calls the witness to say aloud after him—"I swear by Almighty God to speak the truth the whole truth, and nothing but the truth!" No paltry symbol is added to the simple solemnity of this declaration, which appears likely to be far more binding on the conscience of him who makes it before the judge and in the silence of the crowded court. A feature of Scotch trials which appears to be of more doubtful influence is the verdict "Not proven." This midway verdict may terminate a dubious case more speedily, and may often open an escape when evidence is not sufficient. Still, when a jury dreads the responsibility or difficulty of a decision, it will be tempted to glide into this easy, neutral judgment, and the really innocent are only half acquitted, which is the same as nominally acquitted, but morally condemned.—[*Leisure Hour* for April.

—Some Rather Novel Patents.—The whole examining force of the patent office at Washington number about one hundred, of which two are ladies. Of course, among such a large number, there are to be found men of every kind. Some are so illiberal that they will never grant a patent where they can possibly refuse it; others go to the opposite extreme. Each one having his own idea of what constitutes an invention, of what is useful, many ridiculous patents have been granted. One man obtained a patent for a combined plow and cannon. The beam of the plow was made of iron, and bored out so as to form a cannon. Whenever the farmer, while at work in the field, saw savages or tramps approaching, he was to unhitch his team, so as to get them from before the muzzle, apply his match, and say his prayers, for the farmer was a good deal more likely to be killed by the recoil, than the savages by the shot. In case the cannon went off while in use as a plow, it was unfortunate for both the team and the farmer. A patent was granted to another person for tying a brick to a cow's tail, so as to prevent her switching her tail in his eyes while milking. Another received a patent for placing a house on rollers, so that in case of an earthquake the house would not be shaken to pieces. Still another received a patent for a combined trunk and house. The trunk is made with triple walls, so that by taking the articles out of the trunk, and extending the two extra walls, a house is formed. Persons of small means, who intend visiting the centennial, and who desire to avoid paying exorbitant rates for lodging, may find this invention quite useful.